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Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

SUSAN BALDWIN
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Petitioner pro se

August 28, 2007

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QUESTIONS PRESENTED

Whether summary judgment, interpreting all reasonable inferences to the non-moving party, was properly granted which includes the following questions:

1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed.

2. Whether the employer the satisfies *the Ellerth/Faragher* affirmative defense, *i.e*, "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998)*; Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commissioned based sales job, or termination if she does not resign.

3. Whether the Eleventh Circuit erred in determining, contrary to the time period permitted in the Fifth Circuit, that by waiting just over three months to file an internal complaint of sexual harassment (and 38 days after being instructed by her manager- "Don't you ever fucking go over my head. You'll fucking losing your job...") Baldwin was "unreasonable" as a matter of law and thus failed to take advantage of any preventative or corrective opportunities.

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. Rule 14.1(b) the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

The Petitioner here and the appellant below is Susan Baldwin.

The Respondent here and appellee below is Blue Cross and Blue Shield of Alabama.

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INTRODUCTION

The decision below has attracted the attention of employment lawyers and expands the scope of the affirmative defense to extinguish valid Title VII claims from consideration by juries and as one commentator noted, "is much more than a blow to a single plaintiff in a single case".[1]

Although the decision below was only issued in March and the petition for re-hearing or hearing en banc was denied on May 30, 2007, the decision has been cited numerous times to dismiss cases on summary judgment and to reverse a jury decision.[2]

An employee who files an internal complaint of sexual harassment within the 180 day time period allowed to file an EEOC charge in a non-deferral state is, depending on what circuit they live in, now faced with mandatory summary judgment for failing to promptly complain of alleged sexual harassment.

Baldwin, a citizen of the State of Alabama, waited 38 days from a blow up with her supervisor and just over three

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[1] Joanna Grossman, The U.S. Court of Appeals For the Eleventh Circuit Undercuts Sexual Harassment Victims' Rights, http://writ.news.findlaw.com/grossman/20070403.html

[2] *Nurse "Be" v. Columbia Palms West Hosp. Ltd. Partnership*, __ F.3d __ 2007 WL 1953580, at *5 (11th. Cir. (Fla.) 2007); *Minix v. Jeld-Wen, Inc.* 2007 WL 1828259 (11th Cir. 2007); *Smith v. America Online, Inc.*, 2007 WL 1549419 (M.D. Fla May 2007); *Carter v. University of South Alabama Children & Women's Hosp.*, 2007 WL 951739 (S.D. Ala 2007).

months after demands for sex before making her internal complaints.

However, if Baldwin worked in neighboring Mississippi, she would have survived the affirmative defense with respect to reporting harassment. *See Watts v. Kroger*, 170 F.3d 505, 509 (5th Cir. 1999) (A jury could find that an employee who waited over a year until sexual harassment intensified and then waited from spring until July was not unreasonable as a matter of law.) The Ninth Circuit has determined that waiting nineteen days to report harassment is not per se unreasonable as to require summary judgment. *See Craig v. M&O Agencies, Inc.* __ F.3d __, 2007 WL 2264635 (9th Cir. 2007).

Two terms ago – *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 152, 124 S. Ct. 2342, 2357 (2004) – this Court provided the following supplemental guidance to district courts in assessing the affirmative defense:

> Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. See *supra*, at 2354. The plaintiff might elect to allege facts relevant to mitigation in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

Dismissing sexual harassment complaints on summary judgment for failure to timely report sexually harassing behavior transforms the second prong of the *Ellerth/Faragher* affirmative defense to a statute of limitations eliminating the right to a jury trial.

As other circuits allow different times for reporting harassment for purposes of the affirmative defense, further guidance is needed on the burdens of proof associated with the affirmative defense at summary judgment.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007) and is reprinted in Appendix B to the Petition. (App. p. 3a) The District Court's opinion is not reported but is attached as Appendix C. (App. p. 39a)

JURISDICTION

The Court of Appeals for the Eleventh Circuit issued its opinion on March 19, 2007. (App. p. 3a) The Court of Appeals denied the petition for rehearing or rehearing en banc on May 30, 2007. (Appendix A, App. p. 1a) This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISION

The relevant statutory provision is The Civil Rights Act of 1964, §701 *et seq.* as amended 42 U.S.C.A. §2000e *et seq.*

STATEMENT OF THE CASE

A. Factual Background

Plaintiff, Susan Baldwin, a twelve year Blue Cross employee and the only female marketing representative out of nine representatives in Huntsville, Alabama, was terminated shortly after filing an internal complaint for sexual

harassment. Baldwin consistently ranked as a top performer in the number of contracts sold statewide. On November 8, 2001, Emma Barclay, a Human Resource representative spoke with Baldwin and received her written complaint. In receiving the complaint, Barclay noted in writing that, "she [Baldwin] is afraid of losing her job and that her family depends on her finances."

Baldwin's allegations concerned Scott Head, her direct supervisor. Baldwin was the only female representative out of nine marketing representatives in Huntsville, Alabama. Baldwin claims that Head's harassment included sexual propositions such as, "hey, babe blow me" and a request that she spend the night in his hotel room after a company dinner.

Head also allegedly subjected Baldwin to an almost continuous barrage of obscene language and gestures: (1) Head regularly used the word "fuck" or "fucking"around the office; (2) Head regularly used the word "cocksucker" around the office; (3) Head regularly used the word "peckerwood" around the office; (4) Head used the terms "motherfucker" and "bullshit" on numerous occasions;(5) referred to women as "sluts", "tramps" and "bitches" on a regular basis; (6) on a couple of occasions, Head approached Baldwin and played with his pants zipper in front of her saying "hey babe, hey babe"; (7) on two or three occasions Head came up behind Baldwin close enough so that she could feel his breath on her neck and said "Hey Babe"; (8) Head also informed Baldwin that he wanted hire a guy for the job "somebody who has balls like you do"; (9) Head thrust his pelvis towards [plaintiff] so forcefully that she was knocked onto his couch and then demanded oral sex by saying, "hey babe blow me"; (10) Head propositioned [plaintiff] for sex at BCBS banquet honoring top sales people; (11) after [plaintiff] declined Head's request for oral sex, Head graphically described how

he choked his wife, whom he described as a "fucking bitch", during a fight; (12) Head encouraged sexually inappropriate banter among his subordinates by regularly joking with them about sleeping with their wives; (13) Head created an atmosphere where male employees felt comfortable playing with their penis[es] in front of female employees; and (14) Head used the word "babe" when referring to women incessantly. *See* Pet. App. 61a-62a; *Baldwin v. Blue Cross Blue Shield*, 480 F.3d 1287, 1294-95 (11th Cir. 2007).

After leading an investigation that did not include speaking with Baldwin, Rick King, Senior Vice President and Compliance Officer, proposed joint counseling for Baldwin and Head to be conducted by industrial psychologist Dr. Buddy Seay. Blue Cross wanted Baldwin to engage in "couples" therapy with Head "to mold and shape his behavior". Baldwin rejected that option. *Baldwin* at 1299.

On December 7, 2001, Tommy Hudgins, District Manager, met with Baldwin and informed her that her allegations were investigated and could not be corroborated. Hudgins then related that he supported his manager (Head) and that he could not have strife in the office. Hudgins then offered Baldwin a transfer to a position approximately ninety miles from Huntsville, Alabama where she would have to re-start her commissioned based sales career. Baldwin rejected transferring to a new location because she had successfully built a book of business and had family obligations. *Baldwin* at 1299.

On December 14, 2001, Baldwin was sent a letter from Rick King which stated as follows:

> We have suggested that you and Scott Head find a way to resolve the matters that have put a strain on

> this relationship and have offered assistance in this regard. However, you have insisted that you would not continue to work for Mr. Head and that it was our responsibility to resolve all issues you raised to your satisfaction. It was our clear understanding that you were not willing to assume any responsibility for the deterioration in your relationship with Mr. Head.

(*See* Pet. App. Pg. 57a)

Baldwin, already on suspension, did not resign and was terminated.

B. Procedural History

Baldwin, within 90 days after receipt of her right to sue letter, filed a lawsuit in the Northern District of Alabama. The District Court concluded that no actionable sexual harassment occurred. *See* App. p. 39a. In a footnote, the Court indicated that Blue Cross and Blue Shield of Alabama was entitled to an affirmative defense. App. p. 64a, f.n.14.

The Eleventh Circuit affirmed the judgment on the basis of the *Ellerth/Faragher* affirmative defense and declined to make a decision on the question of sexual harassment.

The Court did not find "the offer to transfer" or the request that Baldwin attend counseling with the alleged harasser as a tangible employment action. Thus, the *Ellerth/Faragher* affirmative defense was available.

Under the defense the employer avoids liability if "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or

corrective opportunities [it] provided." *Baldwin*, citing *Faragher*, 524 U.S. at 807, 118 S. Ct. 2293; *Ellerth* 524 U.S. at 765, 1118 S. Ct. 2270.

The Court of Appeals accepted the affirmative defense as a matter of law at the summary judgment stage because the company was not "required to do a full blown due process trial type proceeding in response to complaints of sexual harassment" and that Baldwin's refusal of counseling with her harasser "....is enough to carry the day for Blue Cross on the second element of *Faragher-Ellerth* defense." *Baldwin* at 1304, 1306.

The Court also determined that by waiting just over three months before making her complaint of sexual harassment, Baldwin waited too long. *Id.* at 1306, 1307.

REASONS FOR GRANTING THE WRIT

I. CONTEXT STILL MATTERS

Acknowledging that Title VII is not a civility code does not require a parallel concession that the statute is a license to leverage supervisory authority to request sex and demean the only female marketing representative in the office. There was no testimony in the record that Head, the alleged harasser and manager of the Huntsville office, requested sex from the male representatives. Emma Barclay, Blue Cross's, investigator understood that Baldwin's allegations included demands for sex.

As this Court makes clear in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 370 (1993) "Title VII comes into play before the harassing conduct leads to a nervous breakdown."

Other circuits have rejected the defense of "an equal opportunity harasser." *See Steiner v. Showboat Operating Company,* 25 F.3d 1459, 1463 (9th Cir. 1994) (supervisors consistent abuse of men and women is not a defense to sexual harassment claim); *Smith v. First National Bank* 202 F.3d 234, 242 (4th Cir. 2000) (rejecting arguments that plaintiff was not harassed due to gender because male and females complained about a supervisor's management style); *Brown v. Henderson,* 257 F.3d 246, 252-53, (2nd Cir. 2001) ("Discrimination cannot be cured or disproven solely by favorable, or equitable treatment of other employees of the same race or sex") (citing *Connecticut v. Teal*, 457 U.S. 440, 455, 125 S. Ct. 2525).

The Court's application of the Vince Lombardi rule of "He treats us all like dogs" and "what is true on the practice field is true in the work place" fails to give any weight to the context of the harassment. *Baldwin,* 480 F.3d 1287, 1301, f.n.1 (11th Cir. 2007).

In *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 82, 118 S. Ct. 998, 1003, (1998), the Court recognized that context matters.

> In same-sex harassment (as in all) harassment cases, that inquiry requires careful consideration of the social context in which the particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of the workplace behavior often depends on a constellation of

> surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

In 2006, this Court in examining "material adversity" for purposes of retaliation claims and citing *Oncale* re-emphasized that: "Context matters." *See Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405, 2415, (2006).

Baldwin worked for a nonprofit health insurance company. Baldwin was the only female marketing representative out of nine such persons. Baldwin was upset enough to risk her a job to file a complaint. Baldwin's complaints included objecting to routinely being addressed as "hey babe" and referred to as a "cocksucker" and a "peckerwood".[3] Prior to being suspended and terminated

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[3] In applying the severe or pervasive standard, the District Court rejected any possibility that "pecker wood" was a sexual epithet. "Pecker wood (1859) is U.S. Southern black dialectal inversion of woodpecker (q.v); in folklore, taken as the type of white folks (1929) and symbolically contrasted with blackbird", ruled the Court citing www.etymonline.com , an on-line dictionary. *See* Pet. App 45a f.n.6.

That on-line dictionary definition is found under the entry "Pecker." The Court skipped the definition portion which describes the word "pecker" as a slang word for a penis. Baldwin, originally

Baldwin continued working. A male marketing representative conceded that the Huntsville office was akin to a "boys club".

The fact that men were exposed to the same conduct without objection (absent the requests for sex) does not require Baldwin to accept such treatment. To do so would frustrate the intent of Title VII. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 806, 118 S. Ct. 2275, 2292 (1998) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372, 45 L. Ed. 2d 280 (1975)) ("Primary purpose of the statute is to influence conduct.").

In allowing the affirmative defense, the Court did not answer the question of whether the conduct alleged satisfied the "severe or pervasive standard" to establish a sexually hostile environment. However, Title VII should not be encouraging would be harassers to expand their target range to avoid liability.

II. TANGIBLE JOB ACTION PRESENT

After reporting harassment Baldwin was given the stark choice of participating in counseling to "mold and shape the behavior" of the alleged harasser or re-starting her largely commission-based career in a new city, resign or be terminated. The Eleventh Circuit held that an offer to transfer is only an offer to transfer and not a tangible job action. *Baldwin* at 1300.

When Baldwin declined psychological counseling with her supervisor/alleged harasser and declined to transfer to a

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from Connecticut, testified that she believed the term meant a man with a penis that was erected.

different city, she was terminated from employment. The Sixth Circuit has held that whether a transfer is an adverse employment action is a jury question. *See Keeton v. Flying J.*, 429 F.3d 259 (6th Cir. 2005) *hearing and rehearing en banc denied* (2006), *cert. denied*, 127 S. Ct. 109, 166 L. Ed. 2d 33 (2006) (To the extent an employee needed to consider relocation a transfer can be an adverse job action.).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148, 124 S. Ct. 2342, 2355 (2004), this Court applied "*Ellerth/Faragher*" affirmative defenses to constructive discharge. The Court explained, "Unlike an actual termination which is always effected through an official act of the company, a constructive discharge need not be." When Baldwin rejected the transfer, an actual termination occurred. *See* Pet. App. pg. 66a.

As there were tangible job actions such as the proposed psychological counseling with the alleged harasser and Baldwin's suspension, and termination, Blue Cross should not be eligible for an affirmative defense.

III. THE DECISION BELOW APPLIES TOO STRICT A STANDARD

If there is no tangible job action – as the Court of Appeals held in this case – a defendant can avail itself of the affirmative defense by showing: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff/employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. *Citing Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 at 765, 118 S.Ct. 2257; *accord Faragher*, 524 U.S. at 807, 118 S. Ct. 2275." *Baldwin* at 1303.

In 2004 this Court addressed whether a constructive discharge amounted to a tangible job action and provided additional guidance to as to how the *Ellerth/Faragher* affirmative defense should be applied. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 152, 124 S. Ct. 2342, 2357, (2004).

> Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. See *supra*, at 2354. The plaintiff might elect to allege facts relevant to mitigation in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

As Blue Cross details in Baldwin's termination letter, she reported the harassment, failed to accept of blame for being harassed, rejected good faith efforts to resolve the matter (psychological counseling with the alleged harasser), and the transfer to a new city. *See* Pet. App. pg. 57a. Baldwin was left to choose between termination and resignation. Baldwin continued to work undeterred until placed on suspension.

A. Affirmative Defense Based on Avoidable Consequences Doctrine

The *Ellerth/Faragher* affirmative defense places the burden on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce the harm. *Pennsylvania State Police*, 542 U.S. 129, 146, 124 S. Ct. 2342, 2354 ("Both decisions (*Ellerth/Faragher*) place the burden squarely on the defendant that the plaintiff unreasonably failed to avoid or reduce the harm.").

The underpinnings of the *Ellerth/Faragher* affirmative defense stem from tort law – the avoidable consequences doctrine. That doctrine provides that victims have "to use such means as a reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." *Pennsylvania State Police,* 124 S. Ct. at 2354 (citing *Ellerth*, 524 U.S. at 765 and *Faragher*, 524 U.S. at 807).

In *Ellerth*, the Court explained, "Title VII borrows from tort law the avoidable consequences doctrine, see *Ford Motor Co. v. EEOC,* 458 U.S. 219, 232 n.15, 102 S. Ct. 3057, 3066 n.15, 73 L. Ed. 2d 721 (1982) and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances." *Ellerth* at 764.

Later in the *Pennsylvania State Police* decision this Court also cites C. McCormick, Law of Damages (1935) ("defendant has the burden of persuading the fact finder "plaintiff could reasonably have reduced his loss or avoided injurious consequences"). *Pennsylvania State Police,* 524 U.S. 129, 146, 124 S. Ct. 2342, 2354. Title VII was amended to provide for jury trials. *See* 42 U.S.C. §1981a(c). **Traditionally, the fact finder has been the jury.** *See Arbaugh v. Y&H Corporation*, 546 U.S. 500, 126 S. Ct. 1235, 1244 (2006) ("If satisfaction of an essential element of a claim for relief is at a issue, however, the jury is the proper trier of contested facts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).").

The avoidable consequences doctrine speaks to mitigation of damage issues after the establishment of liability. *See Ford Motor Company v. Dallas Power*, 499 F.2d 400, 415 (5th Cir. 1974) ("The doctrine of avoidable consequences is a recognition of the law's general policy that parties minimize

the damages through reasonable diligence. The doctrine merely goes to a reduction or allowance in damages to be awarded."); *Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171, 1175 (6th Cir. 1988) (The duty to mitigate damages arises after the Defendant's tortious conduct); *Williams v. Jader Fuel Company*, 944 F.2d 1388, 1401 (7th Cir. 1991) (The rule of avoidable consequences comes into play after the injury, citing W. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts); *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989) ("Doctrine of avoidable consequences essentially a rule permitting apportionment of damages").

Unless there are no material factual disputes, applying the avoidable consequences doctrine as *Ellerth/Faragher* affirmative defense is a jury question.

What are the contours of a reasonable time frame to complain about harassment to the employer?

Courts have taken different approaches to this question. *See Watts v. Kroger Company*, 170 F.3d 505, 510 (5th Cir. 1999) (Reversing summary judgment on the affirmative action prong that the employee unreasonably failed to take advantage by waiting from three months from spring until summer to report harassment)[4]; *Homesley v. Freightliner*, 61 Fed. Appx 105 (4th Cir. 2003) (unpublished decision) ("Unquestionably it was a jury decision on the second part of the *Faragher/Ellerth* defense"); *but see Jackson v. County of Racine*, 474 F.3d 493, 502 (7th Cir. 2007) (Summary judgment appropriate on the affirmative defense because the investigation was thorough and resulted in discipline for the

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[4] Baldwin also waited over three months from the allegations of sexual harassment.

alleged harasser and complaining party waited four months after alleged harasser became a manager to make a complaint)[5].

Head was asked whether he received any discipline. He responded no. When asked whether Blue Cross ever suggested counseling to him, Head responded no.

Granting summary judgment establishes that Blue Cross proved their affirmative defense at the summary judgment stage and elevated the plaintiff's burden on opposing summary judgment to the level of a legal requirement.

CONCLUSION

Wherefore premises considered, Baldwin respectfully requests that this petition be accepted by the Supreme Court of the United States.

Respectfully Submitted,

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[5] Baldwin disputes the reasonableness of the investigation including the failure of Rick King, the decision maker, to interview her. *Baldwin* at 1304.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15619-AA

[Filed May 30, 2007]

SUSAN BALDWIN,	)
Plaintiff-Appellant,	)
	)
versus	)
	)
BLUE CROSS/BLUE SHIELD	)
OF ALABAMA	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: CARNES and MARCUS, Circuit Judges, and JORDAN,* District Judge.

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* Honorable Adlaberto J. Jordan, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIUM:

The petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15619
D. C. Docket No. 03-02621-CV-B-S

[Filed March 19, 2007]

SUSAN BALDWIN,
Plaintiff-Appellant,

versus

BLUE CROSS/BLUE SHIELD OF ALABAMA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before CARNES and MARCUS, Circuit Judges, and JORDAN, District Judge.*

CARNES, Circuit Judge:

* Honorable Adalberto J. Jordan, United States District Judge for the Southern District of Florida, sitting by designation.

Employers generally are liable for a supervisor's sexual harassment if the harassment is severe and pervasive enough to result in a hostile work environment amounting to discrimination prohibited by Title VII, 42 U.S.C. § 2000e *et seq*. There is, however, an affirmative defense, which the Supreme Court wrote into the law in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). The defense has two halves, one of which focuses on the employer's responsibility to prevent or correct workplace harassment, and the other of which focuses on the employee's responsibility to protect herself and others from harassment by using the procedures the employer has in place to promptly report it. To prevail under the *Faragher-Ellerth* defense, an employer must show not only that it fulfilled its responsibility, but also that the employee failed to fulfill hers. This appeal presents us with issues about both halves of that defense, some of which we have not addressed before.

I.

The facts we consider are taken from our view of the evidence in the light most favorable to Susan Baldwin, the plaintiff who suffered summary judgment in the district court and is the appellant here. *See Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 556–57 (11th Cir. 1997). She began working for Blue Cross in 1989, and became a marketing representative in the company's Huntsville, Alabama office in 1998. Scott Head became Baldwin's boss in November 2000 when Blue Cross promoted him from marketing representative to the position of district manager in Huntsville. There is no evidence that either of them had been involved in any reported incidents of sexual harassment before the events at issue here.

The record does not paint a complete picture of Head and Baldwin's professional relationship before he became district manager, but there are enough brush strokes that we can see that there were problems. We know, for example, that when Baldwin was first hired, Head told her: "Hey, Baldwin, look, the only reason you are here is because we needed a skirt in the office." Baldwin did not like Head calling all the women in the office "Babe," as in his characteristic greeting "Hey, Babe . . .," although she never complained about it. We also know that Baldwin believed Head had mistreated Blue Cross customers and acted unethically on occasion and she had openly supported another Huntsville staff member for the district manager's position that went to Head. The short of it is that the two had never been each other's biggest boosters.

Nonetheless, on the day Head's promotion to district manager was announced in November 2000, Baldwin stopped by his office to congratulate him. Head told her to sit down and asked, "Hey, Babe, are you on my team?" She told him that everyone in the Huntsville office was on his team and that she would continue to handle her responsibilities as she had. Head replied: "That is not the question that I asked you." When Baldwin told him that she believed she had answered the question, Head stood up, leaned across the desk, and pointed his finger at her. In what she describes as a "very raised tone of voice," Head said, "[t]hat's not the fucking question I asked you. Are you on my team?" As Baldwin puts it, the two of them "proceeded in a very lengthy discussion regarding whether or not I was on his, quote, fucking team." Their talk was also about "power, authority, and respect."

Baldwin described this post-promotion discussion as a "follow up" to an earlier conversation in which she and Head had expressed different views about the same subject when Head was anticipating becoming district manager. After he

had said on that earlier occasion that he was looking forward to having the power and authority of a district manager, Baldwin told him "you may have the power and you may have the authority in this position [they were in the district manager's office], but as far as respect goes, you'll get that from people in the office based on . . . how you handle your job responsibilities." This context reinforced Baldwin's view of Head's "on-my-team" inquiry as a demand for loyalty.

The discussion in question on that November day when Head became district manager ended after about thirty minutes with Head once more asking if Baldwin was on his team and Baldwin simply saying, "Yes, Scott, I'm on the team." Baldwin says that Head's behavior on that day made her feel "pretty threatened." She did not, however, complain to anyone about it, at least not then.

Over the next eight months, there were no problems. When Baldwin went in and asked Head something or if he had a question for her, in her view "everything was handled very professionally." Head did use some offensive language, but not in a threatening manner and not aimed at her specifically. As Baldwin would later explain in her deposition, "[p]rofanity can be used in different ways," and she agreed that "there is a difference in being cursed in front of and [being] cursed at." When pointedly asked, Baldwin testified that she could not recall a specific incident between November 2000 (the day of Head's promotion) and July 26, 2001 (the significance of that date will be apparent later) when she was cursed at "[i]n a threatening kind of manner." Baldwin also conceded that she had herself used profanity in the office, although not on a daily basis.

Head, by contrast, did eventually come to use profanity on a daily basis. And that may be an understatement. If, as John

Marshall Harlan suggested, it is "often true that one man's vulgarity is another's lyric," *Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 1788 (1971), then Head was quite lyrical around the office. He regularly called the marketing representatives, who were all male with the exception of Baldwin, "cocksuckers" and "peckerwoods." For example, he would summon the marketing representatives into a meeting by saying, "Hey, you bunch of cocksuckers, hey, you bunch of peckerwoods, come in here. I need to talk to y'all." Or, during the meeting, he would ask, "Hey, you bunch of cocksuckers, how much business I got coming in?" Head regularly used the word "fuck" in general conversation, as in "what the fuck" or something along those lines. And Baldwin testified that Head used the term "bitch" to refer to women in general, although she could not provide many examples of Head's use of the word in that way. She did recall a single instance, when the two of them were marketing representatives, in which Head referred to a prospective client as a bitch. And she also recalled another instance in which Head, after he became district manager, referred to his wife as a "fucking bitch" (more about that later).

On Tuesday, July 26, 2001, Head along with Baldwin and other marketing representatives from the Huntsville office went to Birmingham for a banquet honoring top Blue Cross managers. After noticing Baldwin speaking to the company president, Head asked her what she had said. Baldwin told him that she had spoken to the president favorably about Head's job performance, to which Head replied, "Thanks Babe, you take care of me, I take care of you."

Later, while the banquet speaker was talking, Head leaned over to Baldwin and invited her to forgo her return trip to Huntsville in favor of a night of dancing and partying that would include her staying in his hotel room in Birmingham.

"No one will ever know," he assured her. Baldwin told Head, "Thanks, a lot, Scott, but I can't do that. I've got meetings tomorrow," or something along those lines. After the banquet was over, she drove to Huntsville.

While she was on the trip home, Head called her and urged her to spend some time with him that night. He told her that he was on his way back to Huntsville himself, was coming to her house, that she should just leave her garage door open, and that he would get some beer, pick her up, put the car top down, and they would "just cruise through Green Mountain, drink and play CDs." Baldwin told Head that she really appreciated the offer but had to decline. Head called her a couple of more times before she got home, and during one conversation when the connection was lost she may have called him back. As Baldwin was pulling into her driveway, Head called her and said that he was at her front door. We don't know for sure whether Head actually was at Baldwin's front door, but she told him over the phone, "Scott, you just need to go home to your wife and kids." He responded, "All right, Babe. All right, Babe."

A few days later—Baldwin thinks it was the following Monday (which would have been July 31, 2001)—Head called her into his office. After she went in, he closed the door, walked behind her, and said "Hey, Babe, blow me," having moved so close to her that the only place for her to go was to fall backwards onto a couch behind her. Baldwin replied by asking Head if there was anything else that he needed her for. When Head replied "No," she got off the couch, retrieved a couple of M&M candies from a jar on Head's desk, and sat down in a chair in front of his desk. Right about then, Head asked Baldwin about her weekend. Baldwin told him that she and her husband had not done anything exciting, and asked Head what he had done over the weekend.

Head said: "Well, you know, we went out partying this weekend" and "that fucking bitch wife of mine, you know, she got tanked and we got home and she came pretty unglued and she came at me," and "I threw that fucking bitch on the floor." When Baldwin replied "What?," Head continued that he got his hands around his wife's neck but then realized that he should get out of his house. That frightened Baldwin, who realized she needed to leave Head's office. She then asked him where he had gone after he left his house, and Head told her he had spent the night at the house of his ex-wife, who was out of town. As Baldwin later said, "And at that point, I realized that I was dealing with somebody who just wasn't quite right." She also had work to do and realized that Head was wasting her time, so she left his office. Baldwin says that she was afraid of Head at this point. But she did not report the conversation or her fears to any higher-up or to anyone in the Human Resources Department.

As Baldwin observed it, from that point on the situation in the office deteriorated. Head's cursing became part of his "standard, everyday . . . conversation in the office." There was also one occasion where Head, explaining his decision not to promote a certain female employee to the position of marketing representative, told Baldwin: "I need to hire a guy for this job, a Susan Baldwin, somebody who has balls like you do." He described the employee he was not going to promote as a "slut" and a "tramp." And, on several occasions around this time, Baldwin overheard Head crack a few jokes with some of her male colleagues about their wives. Head might say something like, "Yeah, your wife looked good this morning," or "Hey, I'm going over to your house this afternoon . . . . to see your wife."

At least twice during this period, Head approached Baldwin's desk and after getting Baldwin's attention with his

trademark greeting "Hey Babe," unzipped his pants fly and moved the zipper up and down. There were "two or three" times when Head would come up behind Baldwin, take a loud breath, say "Hey Babe," and breathe down her neck. Baldwin found Head's behavior offensive; it made her uncomfortable.

The behavior of some of Baldwin's other co-workers was not a model of propriety, either. Once a male colleague, first name Jeff, made a passing reference to his prospective customer "tickler file" in the presence of Baldwin and another co-worker, first name Kirk. After Jeff left, Kirk began playing with his penis through his pants and said to Baldwin, "tell Jeff to tickle this." Baldwin testified, "[i]t was just always like that."

Despite what Baldwin characterized as the "uncomfortable" situations and the "deteriorating" office conditions in August and September 2001, she did not file a complaint with anyone in the company, as Blue Cross' anti-sexual harassment policy and procedures required. Baldwin knew about the policy and procedures because she had periodically received training in them. The material parts of the policy in place during the relevant time provided:

> Our company's policy prohibits any type of harassment, violence, or threat of violence. Any employee who engages in this conduct is subject to termination.
>
> An employee who believes that he or she has been subject to harassment or violence in any form should report the incident or conduct immediately to his or her manager or to Employee Relations. . . . Employee Relations will promptly and thoroughly conduct an impartial investigation of the conduct. . . .

> The manager of Employee Relations . . . will investigate reports, assess and evaluate risks and implement actions to remedy potentially threatening or violent situations.

Baldwin eventually shared her concerns about all of the vulgar language with her secretary, and she told at least two of her co-workers about Head's propositions. She made no attempt, however, to report anything to Employee Relations—which everyone called Human Resources. Career considerations kept her from making a report. She didn't believe at the time that her job was in jeopardy, and she didn't want anything to appear in her personnel file or on her record that could get in the way of a future promotion. As she explained it, her strategy in response to the harassment was to "just go along to get along."

Baldwin began to rethink that strategy not because of any change in the amount of harassment, but because of disputes involving prospective clients and the amount of a bonus check she received. The bonus check she received was for $2,000, but she thought it should have been for $3,000. On the morning of Monday, September 24, 2001, Baldwin walked into Head's office, put the check on his desk, and asked him to do something about it. Head said that he had no control over the amount of the check. Baldwin asked Head if she needed to talk with Tommy Hudgins, who, as Vice President for Sales, was Head's superior. As Baldwin put it, "And at that point, I challenged him on the issue, and he really pretty much came unglued with me." She testified:

> He looked at me and said, [a]re you fucking stupid? Excuse me. He said, Don't you ever fucking go over my head. You'll fucking lose your job, with his finger pointed in my face as he's screaming at me.

After hearing that, Baldwin told Head: "You know what, Scott, I'm done with you. I'm done."

Sometime during their conversation that morning, Head told Baldwin that she was on the verge of insubordination, to which Baldwin replied, "You know what, Scott, if you think I'm insubordinate, why don't you just fire me?" After confronting Head, she walked out of his office to go to an appointment, telling a co-worker along the way that this was the last straw, that she had taken all she could take. She felt that what she had gone through that morning had been "very, very demeaning, very demeaning."

Later that afternoon, Head called Baldwin into his office and tried to make amends. He told her he was uncomfortable with how the morning had gone, to which Baldwin responded that it was obvious he did not care about her perspective. She told him that he had missed an opportunity to manage, to which he responded "in no uncertain terms" that she should not tell him how to manage. The next morning Head told Baldwin that he had called his superiors on her behalf about the bonus issue, but he again reiterated that she was "never to go above his head."

After the exchanges with Head about her bonus check, Baldwin came to believe that her situation at Blue Cross was "pretty miserable," because she was subject to the whims of a "manipulative and controlling" boss. She believed that Head controlled her destiny within the company, and interpreted his remarks as a threat. She feared that she would lose her job, and was convinced she would if she ever went over Head's head. Baldwin had a good relationship with and the utmost respect for Hudgins (Head's supervisor), but she did not report any of this to Hudgins or to anyone else in Blue Cross management for another month and a half.

Two incidents during the next month and a half led to Baldwin finally filing an internal complaint about Head. The first occurred on October 1, 2001, when Head assigned a prospective client to another marketing representative before hearing Baldwin's side of the dispute. Baldwin took this occasion to "confront" Head about the "circus-like conditions in the office," to accuse him of leaking confidential information about her prospects to other representatives, and to tell him that she no longer trusted him. Baldwin explained to Head that during the first six months after his promotion, in her words, "he had won me over based on his actions, but once [he] knew that he had won me over, things deteriorated." The deterioration she referred to was the noise and the "goofing around" occurring in an office with cubicles instead of individual offices. Head dismissed Baldwin's complaints about the poor workplace conditions as "bullshit," but he did call her later that day to apologize about her prospect information being leaked and promised that it would not happen again.

The last incident in the downward sliding relationship between the two also involved a dispute about a prospective client. On October 29, 2001, Baldwin called Head for help. She and another co-worker had gotten into a quarrel about a prospective client, during which the co-worker yelled at her and accused her of being nothing but a problem to everyone in the office. During the call to Head, Baldwin told him what had happened, reiterated her concerns about the circus-like conditions in the office making it difficult to work, and said she would no longer tolerate being yelled at and was "tired of the vocabulary that's being used" around her. Head assured Baldwin that she was not a problem, and as she put it, tried to build her up by reminding her that he had asked her to represent the company at numerous functions and had bragged about her to others. He agreed with her that it was not

appropriate to use profanity in the workplace and assured her that he would talk with the co-worker with whom she had the angry dispute earlier that day.

A meeting was arranged for later that afternoon, but when Baldwin showed up for it at Head's office the offending co-worker was not there. Instead, there was another employee present, which Baldwin took as a sign that Head was planning to counsel her, although he never called it a counseling session. Head told Baldwin that he valued her, that he had always tried to promote her, that he had told many people she was the best salesperson in the office, and that the only problem he had with her was earlier that month involving the dispute over her bonus check. But Head also told Baldwin that people in the office found her to be unapproachable and intimidating. And, in an apparent reference to Baldwin's criticisms about the office atmosphere, Head said that he did not understand her view and told her that "[w]e teach people how to treat us." Uncharacteristically, Baldwin mostly kept quiet during this meeting, sensing that she "wasn't supposed to talk."

Head assigned the disputed prospective client to Baldwin's male co-worker, but, a few days later, asked Baldwin to go to lunch. The lunch with Head, which took place on November 6, 2001, was in Baldwin's view "purely a 'temperature check,'" to see if Baldwin was "OK" and to pacify her. By this time, Baldwin was not okay, but, in her words, she "[didn't] say a word." Two days later, on November 8, 2001, Baldwin finally complained to the Blue Cross Human Resources Department. She met with Emma Barclay of that department and submitted a five-page written synopsis of the conduct she found offensive that had happened since Head's promotion a year earlier. The events referred to in the synopsis and the time that had passed since they occurred are

(although the synopsis did not enumerate them in this fashion): (1) the "on-my-team" conversation in Head's office (12 months earlier); (2) Head's proposition at and after the banquet in Birmingham (more than three months earlier); (3) the "Hey Babe, Blow me," incident (about three months earlier); (4) the bonus check controversy (about seven weeks earlier); (5) the prospective client disputes (the month before); and (6) the lunch that Baldwin and Head had together (two days earlier).

The synopsis that Baldwin gave Barclay also included a paragraph entitled "August 2001," which stated in its entirety:

> The conditions are deteriorating in the office. I am very uncomfortable with the unprofessionalism that is being display [sic] by Scott, and also other members of the staff. Scott repeatedly addresses the Marketing Reps as "Cocksuckers and Peckerwood." He uses the word "fuck" on a regular basis. This type of vocabulary is now being consistently used in the office. It makes me very uncomfortable. It is now difficult for me to even be in the office around Scott. I feel that his conduct is now affecting my ability to perform my job while in the office.

The breathing and zipper incidents were not mentioned in the synopsis, but Baldwin told Barclay about them. The two women spoke for about an hour that day, with Baldwin going through all the notes she had made. According to Baldwin, Barclay listened attentively to her, seemed shocked, and promised to take everything to Rick King, who was then the Blue Cross Vice President of Human Resources and a compliance officer.

On November 27, 2001, King and Barclay, along with Sharon Heaton, the company's Manager of Associate Resources, traveled from Birmingham to Huntsville to investigate Baldwin's allegations. They interviewed Head and three other members of the Huntsville office they thought might have relevant information. One of those three, Bud Smith, was the long-time office manager in Huntsville who would have been in the office at virtually all times during the work day, unlike sales personnel who were often out making calls. Smith was described by another interviewee as being very perceptive, knowing the "pulse" of the office, and being the "ear" to many associates in Huntsville. King thought that Smith would be a "very good and objective witness."

King himself interviewed two of the four potential witnesses including Head, while the two women on the investigating team interviewed one each. The interviews took place in a restaurant near the Huntsville office, with each of the four people being interviewed in different parts of the restaurant or at different times. The result of the questioning of the three people other than Head was that none of them corroborated Baldwin's charges, except that one of the three did say that he had heard offensive language in the Huntsville office. According to Barclay's notes, what the man said about the profanity was that "[e]veryone use[d] it including Susan B."

Barclay's notes also indicate that the answers of one of the employees who was questioned seemed "rehearsed" and that he mentioned Baldwin's name almost before the first question was asked. Barclay later testified that the man's answers did not seem rehearsed, but it did appear that he had come in knowing what the subject matter of the questioning was going to be.

In his answers to King's questions that day, Head admitted using the term "peckerwood" as a nickname for one of the male marketing representatives in the Huntsville office, but he otherwise denied all of Baldwin's allegations. King did not take notes during his interview of Head. He suggested to Head during the interview that the relationship between him and Baldwin could benefit from some outside assistance. King believed that Head seemed open to the possibility of working out his differences with Baldwin.

Where Blue Cross is not able to substantiate complaints of sexual harassment, it is King's practice to warn the accused employee that "if the conduct was true or had been true or if like conduct is proven true in the future, that they will be subject to disciplinary action, up to and including termination." He gave Head that warning both before and after the conclusion of the investigation.

The three members of the investigating team discussed the results of the interviews during the drive back to Birmingham. According to King, they "preliminarily [concluded] that there was no merit to the charges or the contentions that [] Baldwin was making" because they hadn't heard anything to support her allegations. Barclay testified that she turned her notes from the interviews over to King but that the discussion on the drive back was "[j]ust a general conversation but nothing in depth." Her role in the case ended after that.

Baldwin first learned about the results of the investigation on November 29, 2001, which was a couple of days after the Human Resources team's visit to Huntsville, when Baldwin met with King while in Birmingham for some other Blue Cross event. King told Baldwin that no one had corroborated her complaint. She insisted that her charges were true and demanded that Head be fired. King explained that the

company did not have sufficient evidence to do that, and he proposed instead to enlist the assistance of an expert to counsel them and monitor their interactions in order to prevent any future problems. The person he had in mind was an industrial psychologist, Dr. Buddy Seay, whom the company had used successfully in similar cases in the past.

As Baldwin recalled the conversation, King had asked her, in effect, whether she would be willing for the company to work with Head to "mold and shape his behavior." She wasn't willing and rejected King's proposed solution, telling King that she "could not work for Scott." Given what she knew to be Head's past behavior, Baldwin thought that the counseling "was not anything that I thought that I should have to be a part of."

On December 7, 2001, Baldwin met with her old boss Tommy Hudgins, the Vice President for Sales. Hudgins offered Baldwin another means of remedying any problems she was having with Head, which was that she could be a marketing representative in the Birmingham office. Baldwin refused this proposal as well, again saying, "I can't work for Scott" and explaining that her family, friends and clients were located in and around Huntsville. That was the second time she had refused a solution that the company offered.

The third time came in another meeting with Hudgins, which took place on December 10, 2001. In that meeting, Baldwin said that she was not going to participate in counseling with Head and the outside psychologist or accept a transfer to Birmingham. As a result, Hudgins placed Baldwin on administrative leave and instructed her to stop doing company business.

Later that same week, King gave Baldwin another chance to choose between counseling and a transfer, and for the fourth time Baldwin refused to cooperate. She reiterated that she would not work for Head or transfer to Birmingham. As a result, King sent Baldwin a letter demanding her resignation, citing her refusal to work with the relationship counselor in Huntsville or to accept the transfer, and offering her a more generous severance arrangement than she was entitled to receive. Baldwin refused to resign and was terminated, with the enhanced severance arrangement, effective December 20, 2001.

II.

In the litigation that followed, Baldwin sued Blue Cross for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, -3, alleging that Head's harassing behavior created a hostile work environment and that she was fired in retaliation for reporting it. Baldwin also alleged that Blue Cross was liable to her on state law claims of invasion of privacy, intentional infliction of emotional distress, and negligent retention, supervision, and training. After discovery, the parties cross-filed motions for summary judgment. The court denied Baldwin's motion for partial judgment and granted Blue Cross' motion for judgment as to each of Baldwin's claims.

With respect to the hostile environment claim, the district court concluded that the alleged incidents of harassment were not sufficiently severe or pervasive to constitute sexual harassment and that, in any event, Blue Cross had established the affirmative defense provided in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). As for the retaliation claim, the court concluded that

Blue Cross had proffered a non-retaliatory reason for firing Baldwin, and she had not put forward evidence to support a finding of pretext. Finally, regarding the state law claims, the court determined that Head's conduct was not sufficiently extreme to constitute an invasion of privacy or an intentional infliction of emotional distress and, in the absence of an underlying tort, the conduct could not be the basis for a claim for negligent training, supervision, or retention.

In this appeal Baldwin challenges the district court's judgment as to all of her claims.

III.

Title VII prohibits sex-based discrimination that alters the terms and conditions of employment. 42 U.S.C. § 2000e-2(a)(1). The forbidden alteration can be brought about in either of two ways. *Hulsey v. Pride Rests.*, LLC, 367 F.3d 1238, 1245 (11th Cir. 2004). One is through a tangible employment action, such as a pay decrease, demotion or termination. *Id.* The other way is through creation of a hostile work environment caused by sexual harassment that is sufficiently severe or pervasive to alter the terms and conditions of work. *Id.*

A.

Although Baldwin's primary contention is that the terms of her employment were altered by a hostile work environment, she also claims that she suffered tangible employment action discrimination. To support that theory she points to two actions by Blue Cross, the first of which was the offer to transfer her to the Birmingham office in order to resolve the problems she and Head were having. An offer to transfer an employee, however, is not an employment action;

it is merely an offer. Providing an employee with a choice about where she works does not change the terms or conditions of her employment.

The second action Baldwin contends was a tangible employment action is her termination. To be sure, termination is the ultimate change in the terms and conditions of employment because it ends them. But termination will support a claim only if it was caused by discrimination. *See Ellerth*, 524 U.S. at 760, 118 S. Ct. at 2268 (noting that an employer is liable if its "discriminatory act results in a tangible employment action" (emphasis added)). There is no genuine issue of material fact about what caused Baldwin's termination. She refused to work with Head, who was the district manager in Huntsville; she refused to accept a transfer to Birmingham; and she refused to accept the company's offer to resolve the problem through counseling. On at least four occasions Baldwin was given the choice of accepting a transfer or participating in counseling, and each time she adamantly refused to accept either.

Firing an employee because she will not cooperate with the employer's reasonable efforts to resolve her complaints is not discrimination based on sex, even if the complaints are about sex discrimination. Were it otherwise, an employee would be free to refuse any reasonable remedy the employer offered to resolve her complaint. As we'll explain later in our discussion of Blue Cross' obligation under the *Faragher-Ellerth* defense, the offered remedy was reasonable.

B.

Having determined that Baldwin's tangible employment action theory for recovery under Title VII fails at the gate, we turn to her hostile environment theory. To establish her right

to recover under this theory an employee need not show a tangible employment action, but she must show that she was harassed because of her sex, that the harassment was "sufficiently severe or pervasive to alter the terms and conditions of employment," and that there is some basis for holding the employer liable. *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1279–80 (11th Cir. 2003); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc); *see Pa. State Police v. Suders*, 542 U.S. 129, 133, 124 S. Ct. 2342, 2347 (2004).

Although Baldwin complained to Barclay about Head's handling of her bonus check in September 2001 and the dispute with two male co-workers over prospective clients in October 2001, she does not now contend that Head's actions or inactions involving those matters amounted to harassment or other discrimination based on sex.

As part of the harassment she suffered, Baldwin points to the widespread use of profanity. This is hardly a new problem. In the second month of our independence, George Washington issued a general order to the Continental Army in which he bemoaned the fact that "the foolish, and wicked practice, of profane cursing and swearing . . . is growing into fashion." General Orders on Profanity of 3 August 1776, *in* 5 *The Papers of George Washington: Revolutionary War Series* 551 (Philander D. Chase ed., 1993). It was still in fashion two-and-a-quarter centuries later in Blue Cross' Huntsville office. As our earlier description of the facts details, there was a lot of profanity, but the problem for Baldwin's discrimination case is that very little of it was aimed specifically at females. Most of the curse words that were frequently used—"fuck," "fucking," "bullshit," "cocksucker," and "peckerwood"—are relatively gender-

neutral. And it is undisputed (Baldwin herself testified to it) that those curse words were used indiscriminately in front of, and towards, males and females alike. It would be paradoxical to permit a plaintiff to prevail on a claim of discrimination based on indiscriminate conduct.[1]

Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protected category such as sex. Because "[a] claim of sexual harassment [under Title VII] is a claim of disparate treatment," in order to prevail a plaintiff must show "that similarly situated persons not of [her] sex were treated differently and better." *Mendoza*, 195 F.3d at 1254 n.3 (Edmondson, J. concurring). An equal opportunity curser does not violate a statute whose concern is, as the Supreme Court has phrased it, "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002 (1998) (quotation omitted). Another way to put it, as the Supreme Court has, is that the statute does not enact "a general civility code." *Id.* at 81, 118 S. Ct. at 1002; *accord Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1234 (11th Cir. 2006); *Gillis v.*

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[1] This principle might with some justification be called the Vince Lombardi Rule, if what one of his former players said about the great coach is true. Henry Jordan, who played as a defensive tackle for the Packers, when asked how Lombardi treated his players, answered: "[He] treats us all alike. Like dogs!" David Maraniss, *When Pride Still Mattered: A Life of Vince Lombardi* 377 (1999). If so, no one could accuse Lombardi of discrimination, and what is true on the practice and playing fields is also true in the workplace.

Ga. Dep't of Corr., 400 F.3d 883, 888 (11th Cir. 2005); *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001); *Gupta*, 212 F.3d at 587.

Some of the profanity or swear words Head used were more sex specific, which is to say more degrading to women than to men. On one or two occasions Head used the term "bitch" to refer to women, although never in reference to Baldwin herself. A different time he referred to another employee as a "slut" and a "tramp." Somewhat sexually ambivalent was Head's attempt to compliment Baldwin by describing to her the kind of man he needed to hire for a particular job: "a Susan Baldwin, somebody who has balls like you do." Giving Baldwin the benefit of the doubt, these comments may be considered, for whatever weight they have, on the sexual harassment scales.

As further evidence of sexual harassment, Baldwin points to Head and her fellow marketing representatives making sexually charged remarks or jokes about each others' wives, and to the occasion when a male co-worker made a suggestive remark about the prospective customer "tickler file" and played with his penis through his pants in her presence. When a plaintiff alleges that her employer is liable for the harassing conduct of co-workers instead of supervisors, the employer will be held liable only if it "knew or should have known of the harassing conduct but failed to take prompt remedial action." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002) (citing *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000)). There is reason to doubt whether Baldwin can meet that requirement here. In any event, the evidence is undisputed that after an administrative assistant in the Huntsville office complained to Head about the wife remarks and jokes, they stopped. For now, however, we

can assume that this offensive behavior can be attributed to the company, because it will not matter to the result.

Some of Head's remarks and conduct toward Baldwin clearly were sexual in nature. He propositioned her at the Birmingham banquet and on her drive home from it. He cornered her in his office and propositioned her by saying, "Hey babe, blow me." He approached her on more than one occasion and said "Hey babe" while playing with his zipper. And he came up behind her two or three times, said "Hey babe" and breathed down her neck.

The question this part of the case comes down to is whether the sexually harassing conduct that Baldwin did experience during the thirteen months she worked under Head's supervision was "sufficiently severe or pervasive to alter the terms and conditions of [her] employment." *Gupta*, 212 F.3d at 582. The district court concluded that it was not, but that is a question we need not answer in light of our resolution of the issues involving the *Faragher-Ellerth* defense.

C.

The *Faragher-Ellerth* defense is not available where the discrimination the employee has suffered included a tangible employment action. *See Ellerth*, 524 U.S. at 762–63, 765, 118 S. Ct. at 2269, 2270; *see also Faragher*, 524 U.S. at 808, 118 S. Ct. at 2293. As we have already explained, however, Baldwin did not suffer any tangible employment action as a result of the claimed sexual discrimination. The only arguable basis for recovery that she has is hostile environment discrimination, and the *Faragher-Ellerth* defense is available to an employer defending against that type of Title VII claim.

An employer avoids liability under this defense if: (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities [it] provided." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270. Because it is an affirmative defense, the employer bears the burden of establishing both of these elements. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001). Baldwin contends that Blue Cross has established neither one, but we are convinced that it has established both.

As to the first element of the defense, Baldwin does not dispute that Blue Cross has a valid anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees, nor does she dispute that there were reasonable reporting requirements and procedures of which she was fully aware. *See generally Frederick*, 246 F.3d at 1314 (listing requirements of a reasonable sexual harassment policy). The policy and procedures that Blue Cross had in place are substantially similar to others that we have upheld. *See, e.g., Walton*, 347 F.3d at 1287; *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298–99 (11th Cir. 2000). Blue Cross' policies and procedures not only were in place but had been used to fight harassment in the past. Rick King, the Vice President of Human Resources who was in charge of investigating the complaint Baldwin filed, had personally been involved in at least a half dozen investigations of sexual harassment complaints. In the ones where the allegations proved to be true, disciplinary action, up to and including termination, had been taken.

According to Baldwin, the policy and procedures and how they had been applied in the past is not the problem; the

problem is how the company applied them in her case. In the words of *Faragher* and *Ellerth*, the question is whether, once Baldwin complained, Blue Cross "exercised reasonable care to . . . correct promptly any sexually harassing behavior." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270. A threshold step in correcting harassment is to determine if any occurred, and that requires an investigation that is reasonable given the circumstances. The requirement of a reasonable investigation does not include a requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser. Nothing in the *Faragher-Ellerth* defense puts a thumb on either side of the scale in a he-said, she-said situation. The employer is not required to credit the statements on the she-said side absent circumstances indicating that it would be unreasonable not to do so. Although it is not entirely clear, Baldwin does not seem to contest this point.

Instead, she contests the reasonableness of the investigative procedures used by the company in her case. Baldwin argues that there were five deficiencies in the investigation: (1) Rick King, who was in charge of the investigation, failed to speak personally with her during it; (2) King failed to take notes during his interview with Head; (3) the interview of Baldwin's colleagues from the Huntsville office took place in the same restaurant where Head was present (although in a different part of the restaurant); (4) the discussion that took place between King and the two other members of the investigative team after the interviews was not thorough enough; and (5) not enough weight was given to the notes taken by Emma Barclay, a member of the investigative team, indicating that the responses of one of the interviewed employees seemed rehearsed (although Barclay testified in deposition that his answers had not seemed rehearsed, but it

appeared he knew in advance what he would be questioned about).

For two reasons we reject Baldwin's contention that what she describes as shortcomings in the investigation render it unreasonable for *Faragher-Ellerth* purposes. The first reason is there is nothing in the *Faragher* or *Ellerth* decisions requiring a company to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth. *See Carr v. Allison Gas Tubine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1012 (7th Cir. 1994) ("It is difficult for an employer to sort out charges and countercharges of sexual harassment among feuding employees . . . .").

The investigation that Blue Cross conducted at least meets minimum standards for this type of case. It was conducted by the head of the company's Human Resources Department, who was experienced in such matters, and he was assisted by two other members of that department. They not only interviewed Baldwin and Head but also other employees of the Huntsville office whom they had reason to believe would have witnessed the harassment if it had occurred. They did interview Head and the other employees at the same location, but those interviews were conducted separately. Although King himself did not personally interview Baldwin, another member of the investigative team, Emma Barclay, had talked to Baldwin about her allegations for more than an hour, and King had the five-page written synopsis Baldwin submitted.

We will not hold that the investigation does not count, as Baldwin urges us to, because the investigators did not take more notes, because the discussion among them was not more thorough, or because they did not give more weight to a particular factor, such as Barclay's initial impression that the answers of one of the employees seemed rehearsed. To second guess investigations on grounds like those would put us in the business of supervising internal investigations conducted by company officials into sexual harassment complaints. We already have enough to do, and our role under the *Faragher* and *Ellerth* decisions does not include micro-managing internal investigations. Instead, we look only to the overall reasonableness of the investigation under the circumstances, and this investigation was reasonable.

The second independently adequate reason we reject Baldwin's contention that shortcomings in the investigation Blue Cross undertook render the *Faragher-Ellerth* defense inapplicable is the result. We have held that even if the process in which an employer arrives at a remedy in the case of alleged sexual harassment is somehow defective, the defense is still available if the remedial result is adequate. *Walton*, 347 F.3d at 1288 ("[W]here the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow."). In other words, a reasonable result cures an unreasonable process. It does so because Title VII is concerned with preventing discrimination, not with perfecting process. *See Faragher*, 524 U.S. at 805–06, 118 S. Ct. at 2292 (Title VII's "primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." (internal quotation marks omitted)).

Baldwin, however, contests the reasonableness—primarily the adequacy of—the remedial measures Blue Cross offered her. Of course, with human beings there are no guarantees, but it is enough if the remedial measure is "reasonably likely to prevent the misconduct from recurring." *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (internal quotation marks omitted) (quoting *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990)).

Even if we assume that transferring Baldwin to Birmingham was not a proper remedial measure because of the hardship it would have imposed on her, the transfer was just one of the options she was given. Blue Cross also offered to have Dr. Seay, an industrial psychologist on contract with the company, conduct a counseling program with Baldwin and Head and monitor their relationship. Dr. Seay was an expert in the area and had successfully done that sort of thing for Blue Cross before, and the company had no reason to believe that he could not succeed this time.

Counseling is the first-step corrective measure required by the nation's largest employer, the federal government, in all cases of sexual harassment. *See* 29 C.F.R. § 1614.105(a) ("Aggrieved persons who believe they have been discriminated against on the basis of . . . sex . . . must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter."). We are unwilling to hold, as Baldwin would have us, that a warning to the alleged harasser coupled with counseling of both parties and monitoring is not an adequate corrective remedy to begin with where, as here, the employer could not corroborate the allegations.

We have held that warnings and counseling of the harasser are enough where the allegations are substantiated. *See*

Fleming v. Boeing Co., 120 F.3d 242, 246–47 (11th Cir. 1997) (talking to the harasser and telling the complainant to report any further problems was, as an initial measure, enough to constitute "immediate and appropriate corrective action"); *id.* at 247–48 (giving the harasser a verbal warning and transferring the complainant to a different work group in the same facility also constituted "immediate and appropriate corrective action"); *accord Gawley v. Ind. Univ.*, 276 F.3d 301, 306–07, 311–12 (7th Cir. 2001) (issuance of "counseling memorandum" to the harasser was sufficient); *Intlekofer v. Turnage*, 973 F.2d 773, 779–80 (9th Cir. 1992) (lead opinion) (noting that counseling may be a sufficient remedy "as a first resort"); *see also Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 615 (5th Cir. 1999) ("What is appropriate remedial action will necessarily depend on the particular facts of the case . . . [including] the effectiveness of any initial remedial steps." (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989))).

Because warning the harasser and counseling him ordinarily is enough where the employer is able to substantiate the allegations, it certainly follows that the same remedy is enough where it is not able to do so. Here, although Blue Cross wasn't able to substantiate Baldwin's allegations, it could tell that there was hostility between her and Head. Where the employer sees hostility but cannot tell if there has been harassment, warning the alleged harasser, requiring both parties to participate in counseling, and monitoring their interactions is a proper and adequate remedy, at least as a first step.

We will mention the obvious. This is not a case where the employer's first remedy proved inadequate, and it failed to take further action to correct the problem. It is instead a case where the complainant refused to cooperate with the first step.

She did that because she was not happy with Blue Cross' proposed remedy. She not only refused to give Blue Cross' remedy a chance but also insisted that she would not work with Head again. As we have indicated before, the complainant does not get to choose the remedy. *See Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1555 (11th Cir. 1997). This point is relevant to the second element of the *Faragher-Ellerth* defense.

To establish the second element of the defense, the employer must show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270. An employee's failure to take advantage of preventive or corrective measures can take two forms—not using the procedures in place to promptly report any harassment and not taking advantage of any reasonable corrective measures the employer offers after the harassment is reported. Either failure is sufficient to establish the second element of the defense, and in this case we have both. As our preceding discussion shows, Baldwin refused to take advantage of the counseling option, a reasonable corrective measure which Blue Cross offered her, and that by itself is enough to carry the day for Blue Cross on the second element of the *Faragher-Ellerth* defense.

Even if Baldwin had not refused to cooperate with the corrective measure Blue Cross offered after she finally reported the alleged harassment, her failure to report the harassment sooner would establish the second element of the defense. She had a prompt reporting duty under Blue Cross' policy, which provided that: "An employee who believes that he or she has been subject to harassment or violence in any

form should report the incident or conduct immediately to his or her manager or to Employee Relations." An employee must comply with the reporting rules and procedures her employer has established. *See Frederick*, 246 F.3d at 1314 (citing *Madray*, 208 F.3d at 1302; *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1365 (11th Cir. 1999) (per curiam)).

And, more importantly, Baldwin had a prompt reporting duty under the prophylactic rules the Supreme Court built into Title VII in the *Faragher* and *Ellerth* decisions. The rules of those decisions place obligations and duties not only on the employer but also on the employee. One of the primary obligations that the employee has under those rules is to take full advantage of the employer's preventative measures. The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage that amounts to discrimination that violates Title VII. *See Ellerth*, 524 U.S. at 764, 118 S. Ct. at 2270 (limiting employer liability where the employee fails to comply with reporting requirements "encourage[s] employees to report harassing conduct before it becomes severe or pervasive" and serves Title VII's deterrent purpose). But that design works only if employees report harassment promptly, earlier instead of later, and the sooner the better.

Baldwin waited too long to complain. Her complaint came three months and two weeks after the first proposition incident and three months and one week after the second one. That is anything but prompt, early, or soon. *See, e.g., Walton*, 347 F.3d at 1289–91 (an employee's reporting delay of two and a half months after the first incidents of harassment was too long for *Faragher-Ellerth* purposes). Baldwin argues that her delay in reporting the harassment was reasonable because she had good reasons for not doing so

sooner. An employee in extreme cases may have reasons for not reporting harassment earlier that are good enough to excuse the delay, *see Frederick*, 246 F.3d at 1314, but the ones that Baldwin puts forward are not.

Baldwin says that she waited to file her complaint until November 8, 2001—three months after the solicitation in Head's office at the very end of July—because she feared being fired and felt that silence would best serve her career interests. Her goal, she testified, was to "just go along to get along." While we have recognized that filing a sexual harassment complaint may be "uncomfortable, scary or both," *Walton*, 347 F.3d at 1290 (quoting *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003)), we have also explained that, "'the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims.'" *Id.* (quoting *Madray*, 208 F.3d at 1302 (omission and alteration in original)). The *Faragher* and *Ellerth* decisions present employees who are victims of harassment with a hard choice: assist in the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII claim based on the harassment. *See Reed*, 333 F.3d at 35.

Every employee could say, as Baldwin does, that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. As the First Circuit has explained, the Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. *See id.* Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

For these reasons, we conclude that Blue Cross has established both elements of the *Faragher-Ellerth* defense, and on that basis the district court's grant of summary judgment is due to be affirmed.

IV.

We turn now to Baldwin's Title VII retaliation claim, *see* 42 U.S.C. § 2000e-3(a), which is based upon her allegation that she was fired because she complained about Head's sexual harassment. Baldwin relied on circumstantial evidence, and in considering her claim the district court applied the analytical framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).[2] Blue Cross proffered as its non-retaliatory reason for firing Baldwin her insistence that she would not work with Head, and her repeated refusals to either accept the company's proposal for counseling and monitoring or a transfer to the Birmingham office. Finding no genuine issue of material fact about that, the district court granted summary judgment against Baldwin.

As our discussion of the tangible employment action issue in Part III.A above indicates, we agree with the district court that there is no genuine issue of fact about the reason Baldwin lost her job, and the reason is exactly what the district court

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[2] For the first time on appeal, Baldwin argues that a December 14, 2001 letter from King 2 to her constitutes direct evidence of unlawful retaliation, and that the *McDonnell Douglas* burden-shifting framework is for that reason inapplicable. We do not ordinarily consider arguments raised for the first time on appeal. *See Tanner Adver. Group, L.L.C v. Fayette County, Ga.*, 451 F.3d 777, 787 (11th Cir. 2006) (en banc). In any event, our examination of the letter reveals that it does not provide any direct evidence of retaliatory intent (or even circumstantial evidence for that matter).

said: Baldwin refused to cooperate in the company's reasonable attempt to solve the problem. Her argument that Blue Cross' reasons for firing her are pretextual is that she really did not mean what she repeatedly said about not being willing to work with Head. She argues that because what she said about refusing to work with Head was not true, Blue Cross cannot rely on those statements as a basis for firing her. In effect, she is attempting to transfer her dishonesty to the company: she lied to the company, so its reliance on her lie must itself be a lie.

If arguments had feelings, this one would be embarrassed to be here. It faults an employer for taking an employee at her word. Having insisted on three different occasions that she would not work with Head, we will not listen to Baldwin complain that Blue Cross believed her. Baldwin's "had-my-fingerscrossed" argument fails because what counts is not what she believed about her stated intent but what the decision maker at Blue Cross believed, *see Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1363 n.3 (11th Cir. 1999), and there is no genuine issue of fact about that. The evidence is uniform and strong that King, who fired Baldwin, believed she meant what she said about not working with Head. Besides, failure to cooperate in an employer's reasonable corrective action is a non-retaliatory reason for termination, and Baldwin does not contend that she was bluffing when she said she would not cooperate in the proposed counseling and monitoring. That by itself is enough to support the grant of summary judgment.

The district court's grant of summary judgment to Blue Cross on this claim was correct.

V.

Baldwin's final contentions are that the district court erred in granting summary judgment for Blue Cross on her state-law invasion of privacy, intentional infliction of emotional distress, and negligent training, supervision, and retention claims. We agree with the district court that there is no genuine issue of material fact as to an essential element of each of these claims.

As to the invasion of privacy and intentional infliction of emotional distress claims, a plaintiff in Alabama must show that the defendant's conduct was so outrageous that it caused the plaintiff mental suffering, shame, or humiliation (for invasion of privacy) or that it cannot be tolerated in a civilized society (for intentional infliction). *McIssac v. WZEW-FM Corp.*, 495 So. 2d 649, 651 (Ala. 1986). Assuming that Head did everything that Baldwin said he did, his harassment of Baldwin was not sufficiently outrageous as a matter of Alabama law for either claim. *See id.* at 651–52 (granting summary judgment in favor of employer on plaintiff's invasion of privacy and intentional infliction claims where plaintiff alleged facts similar to those alleged by Baldwin here).

As to Baldwin's negligence claims, she must show that Blue Cross had actual knowledge of Head's harassment and did nothing about it (for negligent retention) or would have known about the harassment had it exercised due and proper diligence (for negligent training and supervision). *See Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 824 (Ala. 1999); *Thompson v. Havard*, 235 So. 2d 853, 858 (Ala. 1970). Head, like all Blue Cross employees, had received a copy of and was trained in the company's sexual harassment policy. There is no evidence that Blue Cross knew or had

reason to suspect that Head was harassing Baldwin or anyone else until she reported it.

When Blue Cross had received reports of harassment by other employees in the past, and been able to substantiate the allegations, it had taken disciplinary action up to and including termination. And once Blue Cross received Baldwin's report of harassment, it investigated and attempted to remedy the problem even though it was unable to substantiate her allegations. In other words, there is no basis in Alabama law for holding Blue Cross liable for Head's alleged actions.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 03-B-2621-S

[Filed September 13, 2005]

SUSAN BALDWIN,	)
Plaintiff,	)
	)
vs.	)
	)
BLUE CROSS, BLUE SHIELD	)
OF ALABAMA,	)
Defendant.	)
	)

MEMORANDUM OPINION

This case is presently pending before the court on plaintiff's Motion for Partial Summary Judgment, (doc. 14), and defendant's Motion for Summary Judgment, (doc. 12). Plaintiff Susan Baldwin has sued her former employer, defendant Blue Cross, Blue Shield of Alabama, alleging that her supervisor, Scott Head, sexually harassed her and that defendant retaliated against her for complaining about discrimination, in violation of federal law. Plaintiff also alleges state-law causes of action for invasion of privacy, intentional infliction of emotional distress, and negligent

and/or malicious retention, supervision, and training. Upon consideration of the record, the submissions of the parties, the arguments of counsel, and the relevant law, the court is of the opinion that plaintiff's Motion for Partial Summary Judgment, (doc. 14), is due to be denied, and defendant's Motion for Summary Judgment, (doc. 12), is due to be granted.

I. SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. Credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are left to the jury, and, therefore, evidence favoring the non-moving party is to be believed and all justifiable inferences are to be drawn in her favor. *See id.* at 255. Nevertheless, the non-moving party need not be given the benefit of every

inference but only of every ***reasonable*** inference. *See Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

II. STATEMENT OF FACTS[1]

Plaintiff began working for defendant on August 28, 1989, in the position of Management Candidate. (Doc. 13, Ex. A at 34 and ex. 8 at 411.) Plaintiff worked in various management positions until April 1998, when she became a Marketing Representative in defendant's Huntsville office. (*Id.* at 34-35, 45.) Marketing Representatives are responsible for selling insurance to employers with up to 499 employees. (*Id.* at 52-53; 127-28.) Sales to employers with 500 or more employees are handled by Account Executives. (*Id.* at 53.) Plaintiff routinely ranked high in the state-wide ranking of total contracts sold by defendant's Marketing Representatives. (*See* doc. 15, Ex. 5.) She also received favorable performance appraisals as a Marketing Representative, receiving scores of 86/100 for 1998, 90/100 for 1999, and 92/100 for 2000. (Doc. 13, Ex. A, exs. 8, 9, and 12.)

In 1998, Tommy Hudgins was defendant's District Manager in Huntsville, and he selected plaintiff for the Marketing Representative position. (Doc. 13, Ex. A at 45.) He remained District Manager of the Huntsville office until November 2000, when defendant promoted him to Vice President of Sales. (Doc. 13, Ex. F ¶ 1; *id.*, Ex. I at 27-28.) Defendant promoted Scott Head from Marketing

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[1] For purposes of the Motion for Summary Judgment, all disputed facts and reasonable inferences therefrom have been drawn in favor of the plaintiff.

Representative to District Manager of the Huntsville office to replace Hudgins. (Doc. 13, Ex. A at 62; *id.*, Ex. F ¶ 1.)

Soon after Head was promoted to District Manager, plaintiff stopped by his office to offer him her congratulations. (Doc. 13, Ex. A at 82-83.) Head told plaintiff to "sit down." (*Id.*) At that time, Head asked plaintiff, "Hey, Babe, are you on my team?"[2] (*Id.* at 83.) Plaintiff told him that she thought "everybody in [the office] was on [his] team. (*Id.*) Head responded, "That's not the fucking question."[3] (*Id.*) She told Vince Lindsey, Marketing Representative, about this incident. (*Id.* at 87-88.) She alleges Lindsey told her that Head was a "control freak" and that plaintiff "needed to watch her back." (*Id.* at 88.) Despite this incident, plaintiff testified that Head had performed his job "very professionally" and she had not felt "threatened in any way" by Head from November 2000 until July 26, 2001. (*Id.* at 93-95.)

On July 26, 2001, Head, plaintiff, and other employees from the Huntsville office attended a business dinner at a Birmingham hotel. (*Id.* at 104-06.) During dinner, Head said to plaintiff, "I've got a room here tonight. Why don't you just stay down here and party with me? You know, you don't ever have any fun."[4] (*Id.* at 113.) He told her, "We will go dancing and have a few drinks. You can stay in my room. I'm

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[2] Plaintiff testified Head referred to the female employees in the Huntsville office, including plaintiff, as "Babe". (Doc. 13, Ex. A at 86.)

[3] Head denies using "the 'f' word" at work. (Doc. 13, Ex. E at 48.)

[4] Head testified that he asked all of the Huntsville attendees to stay over in Birmingham. (Doc. 13, Ex. E at 39-40, 43.)

safe. No one will ever know." (*Id.*) Plaintiff declined Head's offer to stay in Birmingham and returned to Huntsville after dinner. (*Id.*)

While she was driving back to Huntsville, plaintiff received a call from Head.[5] (*Id.* at 117.) According to plaintiff, Head asked her to leave her garage door open and told her that he would come by and pick her up. (*Id.* at 117-18.) He suggested that they cruise around and have a good time. (*Id.*) Plaintiff declined Head's offer. (*Id.* at 119.)

A few days following the Birmingham dinner, Head called plaintiff into his office. (*Id.* at 119.) Plaintiff's notes of the incident state:

> Scott call[ed] me into his office, close[d] the door and bow[ed] up next to me and [said], "Hey Babe, Blow me." I [fell] back into the couch as there [was] no where else to go. Now [I was] really backed into a corner. I [was] scared to tell Scott how I really [felt] as [I was] concerned again that [he would] consider me to "Not be on the team."

(*Id.*, ex. 13 at Bates no.18.) Plaintiff testified that she asked Head if there was something else he needed. (*Id.* at 120.) To which Head answered, "No." (*Id.* at 121.) At this point, plaintiff did not leave Head's office; rather, she testified, "So

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[5] Plaintiff testified that Head called her three times and told her that he was following her home and, later, that he was actually at her house. (Doc. 13, Ex. A at 117-19 and ex. 13 at Bates no.17.) Head contends he made only one call to check on plaintiff because he believed she was despondent. (Doc. 13, Ex. F ¶ 3.)

I got off of the couch and I went to his desk. There were two chairs in front of his desk and I got into the M&M jar and I got a couple of M&M's and I sat down." (*Id.*) When she sat down, Head asked plaintiff about her weekend and she, in response, asked him about his weekend. (*Id.* at 121-22.) She testified:

> I said, What did you do this weekend Scott? You know, I wanted to seem interested, and at that point, he said, Well, you know, we went out partying this weekend and he says that fucking bitch wife of mine . . . she got so tanked and we got home and she came pretty unglued and she came at me. And he said, I threw that fucking bitch on the floor.
>
> And I was like, What? He said, Yeah, and I got my hands around her neck. I said, You did what? And he said, Yeah, and ***then I realized, I've got to get out of here***. I said, . . . Where did you go, Scott? . . . He said, I went to Ellen's house. I said, you went to your ex-wife's house? He said, . . . Oh, yeah, . . . she is out of town for the weekend, so I just spent the night there.
>
> ***And at that point, I realized that I was dealing with somebody who just wasn't quite right***.

(*Id.* at 122-23 (emphasis added).)

In addition to these two alleged proposals for sex, plaintiff contends that Head subjected her to an almost continuous harassing conduct, including the following:

> (1) Head regularly said "fuck" or "fucking" and on occasion, "motherfucker";

(2) Head regularly called Marketing Representatives "Cocksuckers" or "Peckerwood"[6]

(3) Head said "bullshit" on numerous occasions;

(4) Head referred to women as "sluts", "tramps", and "bitches" on a regular basis;

(5) Twice Head played with his zipper in front of plaintiff, while saying "Hey Babe"; and

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[6] The court notes that "peckerwood" is commonly understood as a poor or rural Southern white person; it is not a sexual epithet. The Online Etymology Dictionary states, "*Peckerwood* (1859) is U.S. Southern black dialectal inversion of woodpecker (q.v.); in folklore, taken as the type of white folks (1929) and symbolically contrasted with blackbird." << http//www.etymonline.com/index.php?1=p&p=8 >> Similarly, the Anti-Defamation League notes the history of the term as follows:

> Southern blacks used "peckerwood" as a derogatory term to describe poor and/or rural Southern whites. A dictionary of African-American slang explains that the term "peckerwood" had its origins in the word "woodpecker." Blacks saw blackbirds as a symbol of themselves and the contrasting redheaded woodpecker as a representation of whites. Eventually, the word "woodpecker" was inverted to become "peckerwood" in an attempt to hide the meaning and origin of the term. Later, peckerwood came to be used in the North as well, as a general description for white people.

<< http://www.adl.org/hate_symbols/peckerwood.asp >>

(6) On at least three occasions Head came up behind plaintiff, breathed on her neck, while saying, "[H]ey [B]abe".

(Pl. Br. in Opp. to Def. Mot. for Summ. J. at 5-6 (citing doc. 13, Ex. A at 83, 87, 95, 133-35, 157, 161, 231-32, 263, 267-68, 274).)

Plaintiff alleges that, following the alleged sexual proposals, she had three disputes with Head relating to her job as a Marketing Representative, which she does not include in her list of sexually harassing acts.

In September 2001, plaintiff had a disagreement with Head over the amount of a bonus she had earned for achieving her life insurance sales goal. (Doc. 13, Ex. A at 184-86 and ex. 13 at Bates no.18-19.) Apparently, when a Marketing Representative sold a certain amount of life insurance, he or she would receive a so-called "Life Trip" and spending money. (*Id.* at 167, 169.) Service Representatives were also eligible for Life Trips.

Due to the terrorist attacks on September 11, 2001, the Life Trip for 2001 was cancelled. (*Id.* at 172.) Defendant decided to compensate those employees scheduled for the trip by paying each $2,000, and an additional $1,000 if the employee was scheduled to travel with his or her spouse. (Doc. 13, Ex. E at 104.) Plaintiff was scheduled to travel alone. (Doc. 13, Ex. A at 173-74.) On or about Friday, September 22, 2001, plaintiff received a check for $2,000. (*Id.* at 175 and ex. 16 at 18.) That day, she told Head she believed she should have received $3,000; she testified:

> I told Scott that I had sold my way on this trip and I had sold also for my service rep to go on the trip and

> that I felt like it wasn't right that my service rep,[7] who didn't have to sell one product, you know, who wasn't accountable for that sale, was paid more than I was just because my spouse couldn't go on the trip.

(*Id.* at 177 (footnote added).)

The decision to award $3,000 to employees traveling with spouses and $2,000 to employees traveling alone was made by defendant's employees at a higher level than Head's management level. (Doc. 13, Ex. E at 104-05.) Head did not participate in the decision to determine the amount of the Life Trip bonuses paid in 2001. (Doc. 13, Ex. F ¶ 7.)

On the following Monday, September 26, 2001, plaintiff again discussed the amount of her bonus with Head. (Doc. 13, Ex. A at 183.) She testified:

> And I had my check and I put it on Scott's desk and I said, Scott, I would like for you to do something about this.
>
> . . .
>
> He said that he couldn't do anything about it. And so I asked him at that point, I said, Scott, if you can't do anything about this, who can? I don't think this is right. I sold my way on this trip and I'm being paid less than my service rep and I just don't think this is right. So if you can't do anything about this Scott, who can? Do I need to call Tommy?

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[7] Plaintiff's Service Representative is Amy Milar, a female. (*Id.* at 68.)

. . .

> And at that point, I challenged him on the issue, and he really pretty much came unglued with me. He looked at me and said, Are you fucking stupid? . . . He said, Don't you ever fucking go over my head. You'll fucking lose your job, with his finger pointed in my face as he's screaming at me.

. . .

> At that point, I looked at him and I said, You know what, Scott, I'm done with you, I'm done. And so I walked out of the office.

(Doc. 13, Ex. A at 183, 185-86.)[8]

Plaintiff testified that she did not "feel like [her] job was in jeopardy" before the September 26, 2001, incident regarding compensation for the Life Trip, but, after this incident, she feared Head would cause her to lose her job.

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[8] Plaintiff's notes indicate:

> I told Scott that it was very obvious to me that he didn't care about my perspective on the life trip settlements and that more [than] anything, I was looking for him to be empathetic about my perspective. I told him that "he missed an opportunity to manage". He quickly told me not to "tell him how to manage".

(Doc. 13, Ex. A, ex. 13 at Bates no.18.) She also noted, "I am really disgusted now with the way that I am being treated," and, "I am very threatened by the sexual remarks and language that Scott has used with me." (*Id.* at Bates nos. 18-19.)

(*Id.* at 140-41, 164-65.) She testified that, prior to the Life Trip incident, she had not complained to defendant about Head's alleged harassing behavior because:

> I had some very specific career goals. I had a career path that I was trying to travel down and that was to be promoted to the next level of account executive. I didn't want anything, including any comments that were made, any sexual innuendos, any gestures, anything that would appear to not have me fit into the group. I didn't want anything to get into the way of my being promoted.

(*Id.* at 139-40.) She also testified:

> I was very uncomfortable about the situation, but I thought I have worked in this job for three and a half years. I have an outstanding performance record. It will only be a matter of time before a position comes available. I will be able to get out of this situation that I consider to be very unprofessional, very immature and just very, very inappropriate.

(*Id.* at 140.)

In October 2001, plaintiff had disputes with two male Marketing Representative over prospects. (*See* doc. 13, Ex. A, ex. 16 at 19-20.)

On October 1, 2001, plaintiff and Bob Vought, a male Marketing Representative, had a dispute over a prospect, AAA Security. (*Id.* at 205-06 and ex. 13 at Bates no.19.) Plaintiff's notes regarding this incident state, "Scott [made] a decision regarding AAA Security (prospect) in Bob's favor even before hearing my side of the story." (*Id.*, ex. 13 at

Bates no.19.) Head testified that Vought had told him that "every time he went to [plaintiff] and/or, from his understanding, when any other marketing rep went to [plaintiff], if the rules worked in her favor, great, if they didn't, she would attempt to spin it another way so she could get her claws into it." (Doc. 13, Ex. E at 96-97.) Head testified that he awarded the prospect to Vought based on the prospect sheet. (*Id.* at 97.) Marketing Representatives fill out a prospect sheet in order to protect a prospective customer that they have discovered from other Marketing Representatives. (Doc. 13, Ex. A at 204.) However, plaintiff testified that Head told her, "Bob called on this group a couple of weeks ago or months ago or whatever, and it just didn't get on the prospect list, so it's his prospect." (*Id.* at 206.)

On or around October 29, 2001, plaintiff became aware that Thrasher had circulated a prospect sheet, dated October 26, 2001, for a company called Pro-Food International. (*Id.* at 215-217.) Plaintiff claims that, at this time, she "had a business enrolled call Pro-Foods. (*Id.* at 216.) When she saw Thrasher's prospect sheet, she e-mailed Head for a determination of whether Pro-Foods International was a new prospect. (*Id.* at 217.) After e-mailing Head, plaintiff saw Thrasher and asked to speak to him regarding Pro-Foods. (*Id.* at 218.) Plaintiff alleges that Thrasher screamed at her that "[she] want[ed] the rules to change every time to make sure that they appl[ied] to [her]. (*Id.*) Plaintiff responded that she "didn't make the rules," but Thrasher "continue[d] yelling at [her,] saying that [she] was nothing but a problem to everybody in the office," and that "nobody want[ed] to be around [her and] that's why the office environment is hostile towards [her]." (*Id.*)

When this incident was reported to Head, he spoke with plaintiff and Thrasher separately and later together; he decided that Thrasher would receive the Pro Foods prospect. (*Id.* at 224-29, 241.) Head met with plaintiff and Thrasher and told her that he intended to be fair, consistent and nonjudgmental when assigning projects. (*Id.* at 226-27.) Later, Head met plaintiff and Thrasher. At this time, plaintiff told Thrasher that she did not "like being screamed at in the office," and that she did not appreciate the profanity Thrasher had used. (*Id.* at 241.) Thrasher testified that plaintiff got upset and started saying she had been demeaned and "sexually harassed" by many people in the office. (Doc. 13, Ex. K at 76-77.) Thrasher testified Head told him and plaintiff to "be calm," but that he had to rule in Thrasher's favor because "we don't sell employees, we sell groups." (*Id.* at 84.)

Defendant has written policies against sexual harassment. (Doc. 13, Ex. A at 40, 43 and exs. 5, 6; *id.*, Ex. D ¶ 2 and ex. 1.) Although plaintiff had received training with regard to reporting alleged sexual harassment, (*see id.*, Ex. A at 40-42, 60-62), she did report any incident of alleged harassment until November 8, 2001, (*id.* at 87.)

On that day, plaintiff reported her complaints of sexual harassment to Emma Barclay, Compliance Consultant.[9] (Doc. 13, Ex. E at 28-30; *id.*, Ex. H ¶ 3; doc. 15, Ex. 6.) At that time, plaintiff gave Barclay "a written synopsis outlining her complaints and/or allegations." (Doc. 15, Ex. 6; *see* doc. 13, Ex. A, ex.13.) Plaintiff told Barclay "that she [was] afraid of

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[9] The Compliance Consultant is responsible for ensuring employees' adherence to defendant's Code of Conduct and Compliance Program. (Doc. 13, Ex. N at 15.)

losing her job and that her family depend[ed] on her finances." (Doc. 15, Ex. 6.) Barclay told Rick King, Vice President, Human Resources and Compliance Officer, about plaintiff's complaints and gave him plaintiff's written synopsis. (Doc. 13, Ex. D ¶ 1; *id.*, Ex. N at 30; doc. 15, Ex. 6.)

On November 27, 2001, King, Barclay, and Sharon Heaton, Associate Resources Manager, went from Birmingham to Huntsville to interview Head and other Huntsville employees about plaintiff's complaints. (Doc. 13, Ex. A at 259; *id.*, Ex. H ¶¶ 1, 3.) The interviews took place at the Green Hill Grill, a restaurant near the Huntsville office. (Doc.13, Ex. N at 32-33.) Barclay interviewed Thrasher, King interviewed Head and Bud Smith, Customer Service Manager,[10] and Heaton interviewed Jodi Rutenberg, Vought's Service Representative. (*Id.* at 39; *id.*, Ex. C at 52, 74-75.) Barclay testified that Head was present in the restaurant during her interview of Thrasher. (Doc. 13, Ex. N at 34.) Regarding her interview with Thrasher, Barclay noted:

> Kirk mentioned [plaintiff's] name almost before the first question was asked. His responses seemed rehearsed. He appeared to be nervous in the beginning. Kirk also said that everyone would corroborate his story. The only exception would be Jean Nelson. He said that [plaintiff] and Jean seem to be friends. He thinks [plaintiff] reminds Jean of her own daughter. [Plaintiff] was the only person from the office invited to Jean's daughter's wedding.

(Doc. 13, Ex. N, ex. 2 at 667-68.)

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[10]Doc. 13, Ex. A at 226.

King interviewed Head, who denied almost all the allegations made against him concerning profanity and sexual harassment. (*See* doc. 13, Ex. C at 52, 56-68.) He did not take notes during his interview of Head, (*id.* at 40, 55), and he never spoke with plaintiff as part of the investigation, (*id.* at 86-87). In fact, no one spoke with plaintiff regarding her complaints of sexual harassment after her initial complaint to Barclay.

King testified that he, Barclay, and Heaton arrived in Huntsville between 9:30 and 10:00 a.m., and that they left "midafternoon." (*Id.* at 74.) He also testified that he, Barclay, and Heaton "compared notes" and "went over most of the issues one by one. And during that two-hour ride home, preliminarily [concluded] that there was no merit to [plaintiff's] charges or the contentions that [she] was making." (*Id.* at 77.) Barclay, however, testified that she did not recall King discussing anything about his interview with Head during the drive back to Birmingham. (Doc. 13, Ex. N at 74.)

On November 29, 2001, plaintiff went to Hudgins's office in Birmingham. (Doc. 13, Ex. A at 259-60.) Hudgins asked plaintiff, "Why didn't you come to me first?" (*Id.* at 260) Plaintiff told him that she thought that she was supposed to bring her complaint to Human Resources. (*Id.*) Hudgins told plaintiff to meet with King, which plaintiff did. (*Id.* at 262.)

At their meeting, King asked plaintiff what she thought should happen as a result of her complaints, and plaintiff told King she thought Head should be fired. (*Id.* at 288.) Plaintiff's notes of the meeting state:

> Rick tells me that on Tuesday, he Sharon Heaton and Emma Barclay [met] with Scott, Jodi and Kirk.. He

said that no one [corroborates] my complaint. Rick and I follow in a lengthy discussion. I tell Rick that there were no witnesses to Scott's advances to me; however, the vocabulary that is used in the office is "standard talk". Rick and I discuss in detail the circus like conditions in the District Office. He said that he understands the behavior in the District to be what I described. I tell Rick, "With God as my witness, I am telling the truth and that there are serious issues with Scott's behavior. I also tell Rick that I am willing to take a lie detector test to prove that I am telling the truth. I tell Rick that after the compliance meeting that occurred a few months ago in the Huntsville District, "it was all thought to be a big joke." Rick state[d], "I don't know why the folks in Marketing don't take this stuff seriously." . . . He further stated that "Kirk is very immature." Rick ask[ed] me what I would like to happen. I tell Rick that I think Scott should be fired. I then state[d] that I would really hate for anyone to lose their job, but that ***I [knew] that I could not work for Scott***. Rick and I continue[d] the discussion and he ask[ed] me if I would be willing for the Company to work with Scott to "mold and shape his behavior." I told Rick that I was not interested in being any part of that experiment." I also discussed with Rick [the] fact that I was in Management with our company for 5 years and didn't know where in our training manual it stated that management could address company associates in the manner in which Scott had addressed me. Rick ask[ed] me to think the situation over during the weekend and to get back with him the following week to see if there is anything that I could come up with.

(Doc. 13, Ex. A, ex. 13 at Bates nos. 21-22 (emphasis added); *see also* Ex. A at 288-90.)

With regard to the so-called "experiment" to "mold and shape Scott's behavior", King stated:

> I told [plaintiff] that we did not have sufficient evidence upon which to base [terminating Head], but we would enlist the aid of an outside counselor to monitor the relationship between her and Head to attempt to assure that no future work place problems or disputes would be encountered. I had in mind Dr. Buddy Seay who had been retained by [defendant] to monitor similar cases of employee conflict and had done so successfully.

(Doc. 13, Ex. D ¶ 6.) Plaintiff testified that she was reluctant to participate in the "experiment" to "mold and shape Scott's behavior" because –

> I had been threatened by Scott. I had been intimidated by Scott. I had been verbally abused and sexually propositioned by Scott, and that was not anything that I thought that I should have to be a part of, them working with him. I felt like the company should have done that prior to offering him a promotional opportunity to manager.

(Doc. 13, Ex. A at 290.)

On December 5, 2001, plaintiff received a phone message from Hudgins, who told plaintiff that he wanted to meet with her on December 7, 2001. (*Id.* at 293.) Plaintiff's notes regarding the December 7, 2001, meeting, state, "[Hudgins began] the meeting by saying, 'You've had some time to

think, what do you want to do?' I respond[ed] by saying, '*I can't work for Scott*.'" (Doc. 13, Ex. A, ex. 13 at Bates no. 22 (emphasis added).) Hudgins offered plaintiff a transfer to the Birmingham office, which she declined. (Doc. 13, Ex. A at 293-94.) Plaintiff testified that she declined the transfer to Birmingham because she had an established book of business in Huntsville, and her family, friends, and church were in Huntsville. (*Id.*.; *see also* doc. 13, Ex. A, ex. 13 at Bates no. 22.) Hudgins told plaintiff that her complaints had been investigated and that they were uncorroborated. (*Id.* at 295.) According to plaintiff, Hudgins told her, "Scott is the manager. I support him. He will be here for a very long time. You brought charges, [and] they're not [corroborated]. It's over.I can't have strife in the office." (Doc. 13, Ex. A, ex. 13 at Bates no. 22; *see also* doc. 13, Ex. A at 295.)

After she left work that day, plaintiff received a telephone call from Hudgins, who told her that he wanted to meet with her at 10:00 a.m. on Monday, December 10, 2001. (Doc. 13, Ex. A at 298.) At that December 10, 2001, meeting, Hudgins offered again to transfer plaintiff to Birmingham or to allow her to go back to work for Head in Huntsville. (Doc. 13, Ex. I at 76-77; *see also id.*, Ex. A at 300.) Plaintiff again refused to accept either option; Hudgins then placed her on paid administrative leave and instructed her to cease doing company business. (Doc. 13, Ex. A at 300 and ex. 13 at 22; *id.*, Ex. I at 77; *id.*, Ex. D ¶ 7.)

Plaintiff spoke with King on December 14, 2001. (Doc. 13, Ex. D ¶ 7.) She told him that "she would not work for Mr. Head in Huntsville and would not transfer to Birmingham. (*Id.*) On December 15, 2001, plaintiff received a letter from King, dated December 14, 2001. (Doc. 13, Ex. A at 306 and ex. 14.) This letter states:

As you know, we take any allegations regarding sexual harassment seriously, and over the last several weeks have devoted substantial resources [to] investigating your complaint. I have been assisted by Emma Barclay, and others as we questioned a number of associates in the Huntsville Office. While you have re-stated your position quite often, we have not been able to substantiate any of the issues you have raised that you claim constitutes the basis of a hostile environment sexual harassment claim.

We suggested that you and Scott Head find a way to resolve the matters that have put a strain on this relationship and have offered our assistance in this regard. However, ***you have insisted that you would not continue to work for Mr. Head*** and that it was our responsibility to resolve all of the issues you raise to your satisfaction. It was our clear understanding that you were not willing to assume any responsibility for the deterioration in your relationship with Mr. Head. On December 10, 2001, Tommy Hudgins extended to you an opportunity to transfer to the Birmingham District Office as a Marketing Representative and you declined the offer.

Your refusal to continue to work in the Huntsville office or consider a transfer to the Birmingham district leaves us with few options. The company has thoroughly investigated your allegations, found no reason to take action of any type, and exceeded our obligation to offering alternative employment. You have dismissed any effort on our part to continue what has been a fruitful career.

> ***We have no choice by to request your resignation by Thursday, December 20, 2001, or in the absence of your tendered resignation, to terminate your employment on the same date.***
>
> In recognition of your service to the company as a manager and an exempt professional, we are prepared to offer a three month severance arrangement. As you may know, this exceeds severance which would be available to exempt professionals. If we do not hear from you by December 20, you will receive notice of termination.

(Doc. 13, Ex. A, ex. 14 (emphasis added).)

King testified that he believed plaintiff had ***refused*** to work for Head "[b]ecause [he] was told by Mr. Head that she would not come into the office and she also indicated to [King] that she would not work for [Head] anymore." (Doc. 13, Ex. C at 112.) However, Head testified that he did not recall plaintiff ever saying that she would not come to work since he had been the manager and that she had never refused to report to him directly. (Doc. 13, Ex. E at 10.) He also testified that he did not remember King talking to him about getting counseling. (*Id.* at 63.)

On December 19, 2001, plaintiff spoke with Milar and told her that she "would not be back." (Doc. 13, Ex. B at 457, 459.) Plaintiff testified, "I wasn't going to put up with what I was being asked to do just to keep my job." (*Id.* at 459.)

On December 20, 2001, plaintiff called King and told him that she was not resigning her position with defendant. (Doc. 13, Ex. A at 307.) The following day, Heaton sent plaintiff a

letter, which stated in part, "Per your conversation with Rick King on December 20, 2001, you elected not to tender your resignation of employment with [defendant]; therefore, we have no choice but to terminate your employment on this same date." (Doc. 13, Ex. A, ex. 16.)

III. DISCUSSION

A. SEXUAL HARASSMENT - HOSTILE ENVIRONMENT

"When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). To establish a claim for hostile or abusive working environment sexual harassment, an employee must show:

> (1) that . . . she belongs to a protected group; (2) that [she] has been subject to unwelcome sexual harassment . . .; (3) that the harassment must have been based on [her] sex . . .; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding [her] employer liable.

Gupta v. Florida Bd. of Regents, 212 F.3d 571, 582 (11th Cir. 2000)(citing *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999)); *see also Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272, 1279-80 (11th Cir. 2003).

In *Gupta*, the Eleventh Circuit held:

> The fourth element - that the conduct complained of was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment" - is the element that tests the mettle of most sexual harassment claims. Requiring the plaintiff to prove that the harassment is severe or pervasive ensures that Title VII does not become a mere "general civility code."

Gupta, 212 F.3d at 583 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

"Title VII prohibits only the type of severe or pervasive sexual harassment that 'alter[s] the conditions of the victim's employment.'" *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501, 509 (11th Cir. 2000)(quoting *Oncale*, 523 U.S. at 80-81). It "does not prohibit all verbal or physical harassment in the workplace, and does not reach genuine, but innocuous, differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.* (internal quotations omitted). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788. The "conduct must be ***extreme*** to amount to a change in the terms and conditions of employment . . . ." *Faragher*, 524 U.S. at 788 (citing *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-78 (2d Cir. 1989); *Moylan v. Maries County*, 792 F.2d 746, 749-50 (8th Cir, 1986))(emphasis added). However-

> Although [the court] examine[s] the statements and conduct complained of collectively to determine

> whether they were sufficiently pervasive or severe to constitute sexual harassment, the statements and conduct must be of a sexual or gender-related nature . . . before they are considered in determining whether the severe or pervasive requirement is met. Innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party . . . are not counted."

Gupta, 212 F.3d at 583 (internal citations omitted).

Defendant contends, *inter alia*, that plaintiff cannot establish that the harassing conduct at issue was sufficiently severe or pervasive to alter the terms and conditions of plaintiff's employment. Plaintiff contends the following acts of harassment by Head created a work environment that was hostile:

> (1) Head regularly used the work "fuck" or "fucking" around the office; (2) Head regularly used the word "cocksucker" around the office; (3) Head regularly used the work "peckerwood" around the office; (4) Head used the terms "motherfucker" and "bullshit" on numerous occasions; (5) Head often referred to women as "sluts", "tramps" and "bitches"; (6) on a couple of occasions, Head approached Baldwin and played with the zipper of his pants[,] saying "hey babe, hey babe"; (7) on at least three occasions Head came up behind [plaintiff] close enough so that she could feel his breath on her neck and said "hey babe"; (8) Head thrust his pelvis towards [plaintiff] so forcefully that she was knocked back on his couch and he then demanded oral sex by saying "hey babe blow me"; (9) Head propositioned [plaintiff] for sex at a BCBS banquet honoring top salespeople; (10) after

> [plaintiff] declined Head's request for oral sex, Head graphically described how he choked his wife, whom he described as a "fucking bitch", during a fight; (11) Head encouraged sexually inappropriate banter among his subordinates by regularly joking with them about sleeping with each other['s] wives and by making other sex[-]tinged comments about each other's wives; (12) Head created an atmosphere where male employees felt comfortable playing with their penis[es] in front of female employees; and (13) Head used the word "babe" when referring to women incessantly.

(Doc. 19 at 19-20 (footnotes omitted).)[11]

According to plaintiff's evidence, Head requested or suggested sexual favors from her on two occasions: July 26, 2001 and around July 30, 2001. She also alleges that, between July 26, 2001 and September 2001, he played with his zipper twice, (doc. 13, Ex. A at 263-65), and he breathed on her neck three times, (*id.* at 267-68). She does not allege any overtly sexual or gender-related conduct after September 2001. However, she contends that Head continuously called her "Babe" and often referred to all Marketing Representatives, male and female, as "Cocksuckers" and

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[11] Plaintiff does not allege that the incident regarding the Life Trip bonus was harassment, nor does she contend that the disputes regarding the two prospects - AAA Security and Pro Foods International - were harassment. The court notes that these incidents do not constitute "statements and conduct . . . of a sexual or gender-related nature." *Gupta*, 212 F.3d at 583. Therefore, such incidents "are not counted" in the determination of whether plaintiff's work environment was hostile or abusive because of sexual harassment. *Id.*

"Peckerwoods."[12] Plaintiff's evidence also shows that Head cursed excessively and repeatedly said "fuck." However, the context of his cursing evinces that he did not use the word "fuck" to indicate a sexual act; rather, the record indicates he used the word as an adjective to create emphasis.[13]

In light of Eleventh Circuit case law, the court finds that these incidents, considering the totality of the circumstances, are not sufficiently "extreme" to have altered plaintiff's work environment or a reasonable person's work environment because of sex. *Compare Hulsey v. Pride Restaurants*, 367 F.3d 1238, 1248 (11th Cir. 2004)(finding harassment was objectively severe and pervasive based on 18 incidents over two and half weeks including the harasser's "direct as well as indirect propositions for sex," "following [plaintiff] into the restroom, and repeated attempts to touch her breasts, place his hands down her pants, and pull off her pants," and "enlisting the assistance of others to hold her while he attempted to grope her"); *Johnson*, 234 F.3d at 509 (finding harassment was objectively severe and pervasive based on "fifteen separate instances of harassment over the course of four months," which included the harasser "giving [plaintiff] unwanted massages, standing so close to [plaintiff] that his body parts touched her from behind, and pulling his pants tight to reveal the imprint of his private parts") *with Gupta*, 212 F.3d at 584-85 (harassing conduct - including "one

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[12] The evidence is undisputed that Head used the terms Peckerwood and Cocksucker in a non-gender specific manner.

[13]13 For example, plaintiff has offered evidence that Head used the word "fuck" in the following ways – "That's not the fucking question," (doc. 13, Ex. A at 83); "That fucking bitch wife of mine," (*id.* at 122); "Don't you ever fucking go over my head, (*id.* at 185); "You'll fucking lose your job," (*id.*).

occasion [when harasser said], 'You are looking very beautiful,'" frequent telephone calls, isolated "comments about the promiscuity of people from Jamaica as compared to the innocence of people from India," harasser "stared at [plaintiff] twice, touched her ring and bracelet once, and kept asking her to lunch," and harasser "plac[ed] his hand on [plaintiff's] knee once, and . . touch[ed] the hem of her dress once" over six or seven months – was not sufficiently severe or pervasive conduct); *Mendoza*, 195 F.3d at 1247 (harassing conduct –"(1) one instance in which [the harasser] said to [plaintiff,] 'I'm getting fired up'; (2) one occasion in which [the harasser] rubbed his hip against [plaintiff's] hip while touching her shoulder and smiling; (3) two instances in which [harasser] made a sniffing sound while looking at [plaintiff's] groin area and one instance of sniffing without looking at her groin; and (4) [harasser's] 'constant' following and staring at [plaintiff] in a 'very obvious fashion'" – not sufficiently severe or pervasive).

Therefore, because the court finds that plaintiff has not established that the alleged sexual harassment was sufficiently severe or pervasive to support a hostile environment claim, defendant's Motion for Summary Judgment is due to be granted and plaintiff's sexual harassment claim will be dismissed.[14]

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[14] The court also agrees with defendant's argument that, even if plaintiff had established a hostile work environment, defendant would be entitled to the affirmative defense set out in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). However, because the court finds that plaintiff has not established that the alleged harassment was sufficiently severe and pervasive to support a hostile environment claim, the court pretermits discussion of

B. RETALIATION

The parties have filed cross-motions for summary judgment as to plaintiff's retaliation claim.

In order to establish a prima facie case of retaliation in violation of Title VII, plaintiff must establish: (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993). "The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001)(internal citations and quotations omitted). "Once a plaintiff has established a prima facie case, the employer then has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff." *Id.* (citations omitted).

> To survive summary judgment, the plaintiff must . . . come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. To show that the employer's reasons were

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defendant's argument that the evidence supports an affirmative defense.

> pretextual, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence. If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim.

Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004)(internal quotations and citations omitted).

Defendant argues that it is entitled to summary judgment on plaintiff's retaliation claim because (1) plaintiff cannot establish an adverse employment action, (2) plaintiff cannot establish a causal connection between her protected activity and an adverse employment action, and (3) plaintiff cannot establish that defendant's articulated reason for her termination is pretextual.

1. Adverse Employment Action

Plaintiff contends that she was terminated; defendant contends that plaintiff quit or terminated herself. The evidence shows that defendant actually terminated plaintiff. Defendant's letter to plaintiff, dated December 21, 2001, states: "[W]e have no choice but to ***terminate*** your employment on this same date." (Doc. 13, Ex. A, ex. 16 (emphasis added).) For purposes of deciding the Motions for Summary Judgment as to plaintiff's retaliation claim, this evidence is sufficient to establish that defendant actually terminated plaintiff, which is an adverse employment action. *See Stavropoulos v. Firestone*, 361 F.3d 610, 617 (11th Cir.

2004) (citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998)).

2. Causal Connection

The Eleventh Circuit Court of Appeals has held that a plaintiff establishes a causal connection, for purposes of establishing a prima facie case of retaliation, if she demonstrates "that the protected activity and the adverse action were not ***wholly unrelated***." *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999) (emphasis in original; citations omitted). The letter from defendant to plaintiff, dated December 14, 2001,[15] is

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[15] This letter states, in pertinent part –

> [W]e take any allegations regarding sexual harassment seriously, and over the last several weeks have devoted substantial resources investigating your complaint. . . . While you have re-stated your position quite often, we have not been able to substantiate any of the issues you have raised that you claim constitutes the basis of a hostile environment sexual harassment claim.
>
> . . .
>
> . . . The company has thoroughly investigated your allegations, found no reason to take action of any type, and exceeded our obligation by offering alternative employment. . . . We have no choice but to request your resignation . . . or in the absence of your tendered resignation, to terminate your employment . . . .

(Doc. 13, Ex. A, ex. 14 at 24.)

sufficient to establish that defendant was aware of plaintiff's protected activity, and that such protected activity was not ***wholly unrelated*** to her termination.

3. Pretext

Defendant contends that plaintiff was terminated because she refused to work in the Huntsville office and would not accept a transfer to Birmingham. (Def. Br. in Supp. of Mot. for Summ. J. at 30-31 [citing doc. 13, Ex. A, ex. 14].) Plaintiff contends that defendant's articulated reason for her termination is unworthy of credence because she never refused to work with Head and she continued to work with Head until she was suspended. The record shows that, following its investigation of her claims, defendant told plaintiff it had "not been able to substantiate any of the issues [she had] raised that [she] claim[ed] constitute[d] the basis of a hostile environment sexual harassment claim." (Doc. 13, Ex. A, ex. 14.) In response, plaintiff repeatedly stated that she "could not" work with Head. Indeed, plaintiff's notes of her meeting with King state as follows:

> [King] said that no one [corroborates] my complaint. . . . I tell Rick there were no witnesses to [Head's] advances to me; however, the vocabulary that is used in the office is "standard talk". Rick and I discuss in detail the circus[-]like condition in the District Office. . . . Rick asks me what I would like to happen. I tell Rick that I think Scott should be fired. I then stated that I would really hate for anyone to lose their job, but that I did know that ***I could not work for Scott***. Rick and I continue the discussion and he asks me if I would be willing for the Company to work with Scott to mold and shape his behavior". I told Rick that

> I was not interested in being any part of that experiment.

(Doc. 13, Ex. A, ex. 13 at Bates nos. 21-22 (emphasis added).)

She also told Hudgins that she could not work with Head and she would not transfer to Birmingham, to which Hudgins allegedly responded: "Scott is the manager, I support him. He will be here for a very long time. You [brought] charges, [and] they're not [corroborated]. It's over. I can't have strife in the office." (*Id.* at 22.) Plaintiff's notes also indicate that three days following this meeting with Hudgins, on December 10, 2001, Hudgins placed her on paid administrative leave, and "again that the company offered [her] a transfer and that [she] was not interested and that [she] stated that [she] could not work with Scott." (*Id.*)

The Eleventh Circuit has held:

> A plaintiff trying to show pretext based on a defendant's dishonest belief of the grounds the defendant gave for his decision does not succeed by presenting evidence that the defendant was mistaken about the facts upon which he based his alleged non-discriminatory decision. Instead, a plaintiff must present evidence from which a reasonable jury could find that the defendant did not honestly believe the facts upon which he allegedly based his non-discriminatory decision.

Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1265 (11th Cir. 2002) (citing *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1260 (11th Cir. 2001)).

Plaintiff told King and Hudgins that she "could not work with" Head. In her deposition, she testified:

> Q: You just told them that you weren't going to transfer and you weren't going to work for Head under any circumstances; is that fair?
>
> . . .
>
> A: I told them that I could not work for Scott. I did not say under any circumstances. . . .
>
> Q: Well, they offered to allow you to work for Scott under some special circumstances, did they not?
>
> . . .
>
> A: They told me they would work with Scott to mold and shape his behavior.
>
> And I told Rick King that I was not interested in being part of that experiment.

(Doc. 13, Ex. A at 341-42.)

Nothing in the record indicates that King and Hudgins did not, and could not, reasonably interpret plaintiff's statements that she "could not work with" Head as a "refusal" to work with Head. While plaintiff may be able to convince a jury that King and Hudgins misinterpreted her statements that "she could not work" for Head as a refusal to continue to work with Head, she has not produced any evidence upon which a reasonable jury could find that King and Hudgins did not decide to terminate her based on such misunderstanding. *Woodard*, 298 F.3d at 1265. In other words, plaintiff had not

produced substantial evidence upon which a jury could find that defendant's articulated reason for her termination is unworthy of credence and that the real reason was retaliation for filing a complaint of sexual harassment.

Therefore, based on the foregoing, the court finds that defendant is entitled to judgment as a matter of law as to plaintiff's retaliation claim. Defendant's Motion for Summary Judgment as to plaintiff's retaliation is due to be granted and plaintiff's Motion for Partial Summary Judgment is due to be denied.

C. INVASION OF PRIVACY

Plaintiff asserts a tort claim under Alabama law for invasion of privacy. In the context of sexual harassment, the tort of invasion of privacy falls into the category of an intrusion into the plaintiff's solitude or seclusion. *See Phillips v. Smalley Maintenance Services, Inc.*,435 So. 2d 705, 708-712 (Ala. 1983). The Alabama Supreme Court has held:

> The invasion may be physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objections in entering his home. It may also be use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs window with binoculars or tapping his telephone wires. It may be by some ***other form*** of investigation or ***examination*** into his private concerns . . . .

Hogin v. Cottingham, 533 So.2d 525, 528 (Ala. 1988) (*quoting Phillips*, 435 So. 2d at 710-11) (emphasis in *Phillips*).

In *Phillips*, the Alabama Supreme Court found that intrusive and coercive sexual demands or inquiries may constitute an invasive examination into "private concerns." *Id.* at 711.[16] Subsequent cases instruct that "[t]here must be something in the nature of ***prying*** or ***intrusion*** and the intrusion must be something which would be offensive or objectionable to a reasonable person. The thing into which there is an intrusion or prying must be, and be entitled to be, private." *See Hogin v. Cottingham*, 533 So. 2d 525, 531 (Ala. 1988) (citations and quotations omitted; emphasis added). Further, the Alabama Supreme Court has "defined the tort as the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." *See McIsaac v. WZEW-FM Corp.*, 495 So. 2d 649, 651 (Ala. 1986). Courts have repeatedly held that the conduct must be ***extreme*** to constitute a tort of invasion of privacy under Alabama law. *Compare Portera v. Winn Dixie of Montgomery*, 996 F. Supp. 1418, 1422, 1435-36 (M.D. Ala. 1998) *with McIsaac*, 495 So. 2d at 651.

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[16] In *Phillips*, the plaintiff's supervisor called her into his office on numerous occasions, locked the door, covered the windows, and questioned her about her sexual relationship with her husband. *See Phillips*, 435 So. 2d at 707. On many occasions he inquired as to sexual positions and asked whether they engaged in oral sex. *Id.* Plaintiff's supervisor invited the plaintiff to have a drink, and threatened her job if she did not engage in oral sex with him. *Id.* Plaintiff's supervisor further asked the plaintiff if she was goingto "show gratitude" to him by engaging in certain sexual acts. *Id.* The Alabama SupremeCourt found this severely intrusive conduct was sufficient to support an invasion of privacy claim.

The incidents in this case are not sufficiently extreme or intrusive to constitute an actionable claim for invasion of privacy. *See McIsaac*, 495 So. 2d at 651. There is no allegation that Head pried or intruded into plaintiff's private affairs, nor is there any allegation that he touched her in an inappropriate manner. *Compare Portera*, 996 F. Supp. at 1422, 1435-36 *with Kelley v. Worley*, 29 F. Supp. 2d 1304, 1308, 1311 (M.D. Ala. 1998).The allegations of Head's sexual harassment of plaintiff fall short of that required to constitute an invasion of privacy claim. Thus, defendant is entitled to judgment as a matterof law as to this claim.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendant contends that plaintiff's allegations of harassment are insufficient to support a claim for intentional infliction of emotional distress. "In Alabama, the tort of outrage only applies 'in the most egregious circumstances.' The conduct complained of must be 'so outrageous as to be regarded as atrocious and utterly intolerable in a civilized society.'" *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 755 (11th Cir. 1996)(quoting *Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1044 (Ala. 1993); *American Rd. Serv. Co. v. Inmon*, 394 So.2d 361, 365 (Ala. 1981)).

"The initial determination as to whether a statement or action is sufficiently extreme or outrageous to support a cause of action for outrageous conduct is for the trial court to make ***as a matter of law***." *Bivins v. Jeffers Vet Supply*, 873 F. Supp. 1500, 1509 (M.D. Ala. 1994) (citing *Grimsley v. Guccione*, 703 F. Supp. 903, 907 (M.D. Ala.1988)) (emphasis added). The Supreme Court of Alabama has consistently held that the tort of outrage or intentional

infliction of emotional distress only applies "in the most egregious circumstances." *Thomas v. BSE Industrial Contractors, Inc.*, 624 So.2d 1041, 1044 (Ala.1993). That court has also held:

> [M]ere insults, indignations, threats, annoyances, petty oppressions, or other trivialities [do not constitute outrageous conduct]. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind.

Surrency v. Harbison, 489 So.2d 1097, 1105-06 (Ala.1986)(internal quotation marks omitted). This court has held that, under Alabama law –

> [m]ere requests for sexual favors are not sufficient [to support a claim of outrage]. Nor are demands which, if refused, carry a consequence of economic loss or loss of status at employment sufficient. However, when the sexual impositions are not merely verbal or economic, but become physical impositions, the harasser is no longer attempting to request sexual favors (in exchange for job security), but is instead attempting to force sexual liberties. An employee can decline even the most obscene request to be touched in a sexual manner. An employee cannot decline a physical act that has already occurred. At that point, the harasser's conduct goes beyond the simply base and oversteps the tolerable bounds of a civilized society.

Brewer v. Petroleum Suppliers, Inc., 946 F. Supp. 926, 936 (N.D. Ala. 1996) (Propst, J.)(internal citations omitted).

Viewing the facts of the complaint in the light most favorable to plaintiff, this court holds that the facts alleged by plaintiff, as a matter of law, do not support a finding of intentional infliction of emotional distress. *See Brogdon v. Alabama Dept. of Economic and Community Affairs*, 864 F. Supp. 1161, 1167-1168 (M.D. Ala. 1994); *Mooney v. Henderson and Walton Women's Center-East, Inc.*, 684 So.2d 1340, 1343-44 (Ala. Civ. App. 1996).

E. NEGLIGENT TRAINING AND SUPERVISION OR RETENTION

Plaintiff alleges that defendant failed to properly train Head regarding its anti-sexual harassment policies and anti-retaliation policies. She also contends that defendant failed to terminate Head after it received notice of his harassment of plaintiff.

"A party alleging negligent or wanton [training, retention, and] supervision . . must . . . prove the underlying wrongful conduct of employees." *Voyager Ins. Companies v. Whitson*, 867 So.2d 1065, 1073 (Ala. 2003)(citing *Stevenson v. Precision Standard, Inc.*, 762 So.2d 820 (Ala. 1999)). In other words, the Alabama Supreme Court has held that a defendant-employer "could not be independently guilty of negligence or wantonness in training or supervising [its employee] in the absence of some tort committed by him against [the plaintiff]. *Taylor v. Stevenson*, 820 So.2d 810, 812 (Ala. 2001).

For the reasons set forth above, the court finds that plaintiff has not established that Head committed any tort

against her. Therefore, defendant is entitled to summary judgment as to plaintiff's claims of negligent/malicious training, retention, and/or supervision of Head.

CONCLUSION

For the foregoing reasons, the court is of the opinion that there are no material facts in dispute and defendant is entitled to judgment as a matter of law. An Order granting defendant's Motion for Summary Judgment and denying plaintiff's Motion for Partial Summary Judgment will be entered contemporaneously with this Memorandum Opinion.

DONE this 12th day of September, 2005.

/s/

SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

APPENDIX D

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The U.S. Court of Appeals for the Eleventh Circuit Undercuts Sexual Harassment Victims' Rights: How the Decision Underlines Problems with the Supreme Court's Approach To Hostile Environment Harassment

By JOANNA GROSSMAN

[Tuesday, Apr. 03, 2007]

In its recent opinion in *Baldwin v. Blue Cross*, the Eleventh Circuit ended Susan Baldwin's attempt to seek legal redress for the sexual harassment she alleges that she suffered at the hands of her supervisor. But this decision is much more than just a blow to a single plaintiff in a single case.

The ruling is a veritable minefield for future plaintiffs. Moreover, from a broader perspective, the ruling exposes fundamental flaws in the doctrine of employer liability for sexual harassment that has been crafted by the Supreme Court. These flaws make it too easy for employers to avoid liability, and too difficult for employees who have experienced actionable discrimination to recover.

Employer Liability for Sexual Harassment: Some Nuts and Bolts

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. Sexual harassment is a form of sex discrimination, long recognized as illegal under Title VII. For a sexual harassment victim to prevail in court, however, she must prove not only that she suffered harassment that was sufficiently severe or pervasive to be actionable, but also that there is some basis for holding the employer liable for the harassment.

The Supreme Court established rules governing supervisory sexual harassment in twin 1998 opinions, *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*. In those cases, the Court ruled that employers are only *strictly* liable (that is, liable even in the absence of proof of fault) for supervisory harassment when it results in a tangible employment action taken against the victim such as a demotion, a cut in pay, or being fired. In such cases of "quid pro quo" harassment, the supervisor typically demands sexual favors and punishes the employee who refuses to provide them.

In cases in which the nature of the harassment alleged is "hostile environment," the Court made clear that the legal standard is very different. In these cases, the employer is automatically liable to begin with - but then has the opportunity to avoid liability or damages by proving an affirmative defense.

The affirmative defense requires a two-pronged showing. First, the employer must show it took reasonable care to prevent and correct harassment. Second, it must also show that the victim unreasonably failed to take advantage of

corrective opportunities, such as internal grievance procedures, made available by the employer.

Let's now see how the two-pronged affirmative defense rules played out in Susan Baldwin's case.

The Hostile Environment Alleged by Susan Baldwin

Baldwin worked for Blue Cross in Huntsville, Alabama as a marketing representative. In November 2000, Scott Head became her boss when he was promoted to district manager. According to the facts as judged in the light most favorable to the plaintiff (the required stance for an appellate court reviewing a grant of summary judgment to the defendant), Head engaged in two types of conduct that Baldwin found unwelcome and offensive:

First, he used profanity regularly, and used sex-specific derogatory terms to refer to both employees and applicants. Male subordinates were "peckerwoods" and "cocksuckers"; female employees were "bitch" or "babe"; one female applicant was not hired, according to Head, because she was a "slut" and a "tramp." (He apparently reserved "fucking bitch" for his wife, when complaining about her at work.)

The second type of conduct about which Baldwin complained was more serious and targeted directly at her. On July 26, 2001, Head accompanied Baldwin and other marketing representatives to a banquet for Blue Cross managers in Birmingham. During the banquet speech, Head leaned over to Baldwin and invited her to dance, party, and spend the night in his hotel room in Birmingham, rather than driving home. "No one will ever know," he promised. She declined the invitation politely and left to return to Huntsville.

While she was driving home, Head called and urged again that she spend the night with him. He said he was driving to her house in Huntsville and that he would be there with beer to pick her up. He called several more times, telling her during one call that he was at her house, waiting. Baldwin told him to go home to his wife and kids.

A few days later, when Baldwin went to Head's office for a meeting, he closed the door, cornered her against a couch and said "Hey, Babe, blow me." She moved across the room and changed the subject. Head offered a report on his weekend: "Well, you know, we went out partying this weekend and that fucking bitch wife of mine, you know, she got tanked and we got home and she came pretty unglued and she came at me," and "I threw that fucking bitch on the floor." Head continued with more details about his interaction with his wife, leading Baldwin to become very concerned about her own safety around him, particularly given his sexual advance just a few minutes earlier.

In the months that followed this meeting, Head continued to engage in many forms of inappropriate behavior, including several incidents targeted directly at Baldwin. One time, after getting her attention by calling out "Hey Babe," Head unzipped his pants and began moving the zipper up and down. Other times, he would come up behind her, and literally breathe down her neck.

Throughout these months, Baldwin did not report Head's conduct to the employee relations department, as directed by the company's sexual harassment policy. However, she confided periodically to coworkers about his sexual propositions. Finally, on November 8, 2001, after she had two major conflicts with Head, she filed an internal complaint.

Blue Cross's Response to Baldwin's Complaint: Punish the Victim?

To be more specific, Baldwin submitted a written synopsis of her allegations about Head's behavior. She met with Emma Barclay in the human resources department and gave an oral synopsis as well.

As a result, Barclay; Rick King, the vice president of human resources; and Sharon Heaton, another human resources employee, traveled to Huntsville to investigate Baldwin's allegations. They interviewed Head and other employees at a local restaurant, ultimately concluding that they could not substantiate Baldwin's allegations.

Because the company deemed the evidence "inconclusive" as to whether Baldwin was harassed, they refused to discipline Head. Instead, they gave Baldwin two options to make her work environment tolerable: go to counseling with Head, or transfer to an office in another city two hours away. When Baldwin refused both options, she was terminated.

Was There Actionable Harassment? The Court Wrongly Says No

The district court had granted summary judgment to Blue Cross, and the Court of Appeals for the Eleventh Circuit affirmed that ruling. Thus, as noted above, Baldwin lost. At the same time, so did other sexual harassment victims who must try their cases within the Eleventh Circuit, which encompasses Alabama, Florida and Georgia.

That is because the ruling dramatically undermines the ability of Title VII to provide such plaintiffs with appropriate legal

redress for discrimination they have suffered. Significantly, the court made it harder to prove that harassment is actionable and harder to prove that the employer should be held liable:

First, the district court found that the harassment Baldwin alleged, even if true, was not sufficiently severe or pervasive to be actionable. The Court of Appeals did not directly affirm this aspect of the ruling, since the case was disposed with on other grounds. However, its analysis suggests it would have reached the same (wrong) conclusion.

Of course, the district court was right that the mere use of profanity at work is not inherently unfair to women. However, the use of derogatory sex-specific terms like "bitch" and "slut" surely is.

It's true, too, that not all jerks are harassers. Yet a jerk of a boss should not be insulated from claims of harassment simply because he also does other obnoxious things, in addition to harassing a subordinate.

Moreover, and more importantly, a supervisor's repeated, unwanted sexual advances toward a subordinate are clearly sufficient to be actionable in a court of law. And based on the facts above - the facts the Eleventh Circuit considered for purposes of his decision - Baldwin plainly suffered a string of repeated, unwanted sexual advances..

Did the Employer Satisfy the Affirmative Defense? The Erroneous "First Prong" Finding that the Investigation Sufficed

Not only did the Court of Appeals suggest wrongly that the harassment Baldwin suffered was not sufficiently severe or

pervasive, but it also wrongly found that the employer had established both prongs of its affirmative defense.

(In this section of the opinion, the Court of Appeals focused only on the question of liability, rather than on the validity of the underlying claim of harassment. For, under the somewhat perverse structure of harassment doctrine, an employee can suffer illegal harassment and yet have no legal remedy - if the harassment is of the "hostile environment" variety, and the employer establishes the affirmative defense.)

In analyzing Blue Cross' assertion of the *Faragher/Ellerth* affirmative defense, the Court of Appeals made several key mistakes:

First, the Court of Appeals wrongly concluded that Blue Cross established the first prong of the affirmative defense in that they took reasonable measures to prevent and correct harassment. In reaching this conclusion, the court refused to look closely at the deficiencies Baldwin alleged in the internal investigation.

Among other things, Baldwin complained about the method and location for interviewing witnesses, and the investigators' dismissal of concerns they themselves had raised that the witness reports seemed "rehearsed." The deficient investigation, she alleged, had serious consequences: the company failed to find that she had been harassed by her supervisor.

Given that the witnesses interviewed were also subordinates of Head's, the possibility is strong that they lied during the investigation, to save their own jobs. Also, if they sounded rehearsed, was it perhaps because Head prepped them? Or, did they get together on their own, to make sure their stories

were consistent? These possibilities suggest the need for a much more searching investigation than Blue Cross actually undertook here.

Rather than evaluate the investigation for legal sufficiency, however, the court complained: "We already have enough to do, our role under the *Faragher* and *Ellerth* decisions does not include micro-managing internal investigations."

This is a strange complaint from a court charged with implementing federal laws. In *Faragher* and *Ellerth*, the Supreme Court established a framework that made internal investigations the centerpiece of the remedial structure for problems of workplace harassment. Victims who fail to complain lose their right to sue; employers who fail to maintain grievance procedures are subject to strict liability for harassment.

With stakes this high, resulting from a line the Supreme Court drew, how can an appellate court refuse to seriously evaluate a company's internal investigation? When victims lose their right to sue, it ought to be because companies provided at least some counterpart of a fair court procedure. If not, then companies can use monkey trials to evade the law.

Indeed, under the Court of Appeals's standard, employers have no incentive to conduct a good investigation, since any old investigation will offer them the same safe harbor from liability. The court specifically wrote that a legally sufficient investigation "may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth." But, again, informal inquiries - like the one here, a chat at a local restaurant -- are hardly a substitute for one's day in court.

Second, the Court of Appeals concluded that the "remedial" options offered to Baldwin - go to counseling with the alleged harasser, accept a transfer, or be fired - were reasonable.

Recall that, because the court was reviewing a grant of summary judgment to Blue Cross, it was required to assume that the harassment occurred as Baldwin alleged. In light of that assumption, how could the court truly say that these options represented reasonable efforts to correct the problem?

Consider, once again, what those options were: Why should a victim of harassment have to undergo counseling with the man who visited unwanted sexual advances on her? After all, the initial harassment was traumatic enough. Sending the two to counseling, as if they were a couple, only furthers the harasser's view of their relationship, which is supposed to be collegial, not romantic.

In addition, why should she have to relocate, lose her "book" of business, and start over just to get away from him? And why should she be fired for being unwilling to make a choice between two profoundly unfair alternatives?

These two flaws worked together against Baldwin: Because the company conducted a poor investigation, they were not able to corroborate her allegations and refused to take action against the supervisor. Then, because the court refused to review the quality of the investigation, the "remedial" options offered to a plaintiff with unsubstantiated allegations were deemed reasonable. If the witnesses' "rehearsed" descriptions of the work environment had been further tested, perhaps the company would have decided to offer Baldwin more palatable remedies.

The Erroneous "Second Prong" Finding that Baldwin Was Untimely in Reporting the Harassment

Third, the court wrongly held that the employer established the second prong of the affirmative defense as well -- the one that focuses on the victim's failure to take advantage of corrective opportunities made available by the employer.

Baldwin, the court said, did not comply with her duty to promptly report harassment she experienced at work. She complained three months after the first sexual advance, which, according to the court, "is anything but prompt, early, or soon."

Why didn't Baldwin complain right away? Her goal, she testified, was to "just go along to get along." Research shows that this is the typical reaction of victims in her situation, who face many deterrents to complaining about harassment, such as retaliation, ostracization by co-workers, and being labeled a "complainer" to name just a few. (I've discussed research on victim reporting and reactions at greater length in an earlier column.)

Yet, the court deemed Baldwin's behavior unreasonable as a matter of law - rather than simply holding that it raised a genuine issue of fact that a jury ought to resolve. Other federal courts have been similarly stingy in their interpretation of this prong, holding delays as short as a week sometimes to be inexcusable. But these interpretations, too, fail to accord with the reality as to how long it takes bona fide victims to complain. Our society sends deeply mixed messages when it encourages women to try to thrive in a male world, yet - through decisions like these - also tells them they must instantly complain at the first sign of potential harassment.

Finally, the court also faulted Baldwin for failing to cooperate with her employer by accepting one of the "remedial" choices they offered her. Given her view of her supervisor, his behavior, and the importance of her own career, it is hardly surprising or unreasonable that she would reject both options.

A Court That Thought it Had Better Things to Do Than Enforce the Law

The Eleventh Circuit Court of Appeals has, with its decision in Baldwin v. Blue Cross, done a disservice to Title VII and all the victims of harassment who deserve its protection.

What hope is there for eradicating sex discrimination in the workplace, when a federal court claims it has better things to do than enforce the legal standard by which it is bound?

Joanna Grossman, a FindLaw columnist, is a professor of law at Hofstra University. Her columns on family law, trusts and estates, and discrimination, including sex discrimination and sexual harassment, may be found in the archive of her columns on this site.

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No. 07-275

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In The

Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner states the following issues as being presented and worthy of review by the Court. Respondent contends that these issues misstate the holding of the Eleventh Circuit Court of Appeals and that there are no issues which could be properly phrased to justify this Court's review of the decision below.

Whether summary judgment, interpreting all reasonable inferences to the non-moving party, was properly granted which includes the following questions:

1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed.

2. Whether the employer satisfies the *Ellerth/Faragher* affirmative defense, *i.e.*, "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth,* 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commission-based sales job, or termination if she does not resign.

QUESTIONS PRESENTED – Continued

3. Whether the Eleventh Circuit erred in determining, contrary to the time period permitted in the Fifth Circuit, that by waiting just over three months to file an internal complaint of sexual harassment (and 38 days after being instructed by her manager – "Don't you ever fucking go over my head. You'll fucking lose your job . . . ") Baldwin was "unreasonable" as a matter of law and thus failed to take advantage of any preventative or corrective opportunities.

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. Rule 14.1(b) the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

The Petitioner here and the appellant below is Susan Baldwin.

The Respondent here and the appellee below is Blue Cross and Blue Shield of Alabama.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Pursuant to Supreme Court Rule 29.6, Respondent, Blue Cross and Blue Shield of Alabama states that it is an Alabama not-for-profit corporation that issues no securities to the public, and is not owned by any parent or publicly held corporation.

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BRIEF IN OPPOSITION

The Petition should be denied because the decision of the Eleventh Circuit followed the relevant precedential decisions of this Court, and the Petition raises no important undecided issue of federal law or any conflicting decisions from United States courts of appeals warranting this Court's review.

The Eleventh Circuit correctly stated and properly applied the affirmative defense recognized by this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) ("the *Ellerth/Faragher* defense"). The arguments advanced in the Petition are founded in Petitioner's misinterpretation of the decision of the Eleventh Circuit in this case. The Petition implies that the court's holding creates a time-barred "mandatory summary judgment" standard in the Eleventh Circuit which results in a conflict among United States courts of appeals. No such conflict is disclosed in the cases cited by Petitioner and no such conflict in fact exists.

The Eleventh Circuit did not direct "mandatory summary judgment" in cases where the plaintiff delays a report of sexual harassment under an appropriate policy against such activity more than three months. Instead, accepting the Petitioner's allegations as true in this case, the Eleventh Circuit

held the Petitioner's delay, under all the circumstances, in reporting her stated concern over alleged sexual harassment, vulgar language and rude behavior in the Respondent's Huntsville, Alabama office, failed to satisfy her obligation to act reasonably in reporting what she considered to be sexual harassment promptly under a policy of which Petitioner was admittedly aware under the undisputed facts of this case.

The Eleventh Circuit also held that Petitioner refused to take advantage of the reasonable corrective measures that Respondent offered her, and that this refusal established the second element of the *Ellerth/Faragher* defense.

STATEMENT OF THE CASE

Respondent adopts for purposes of this Petition the statement of facts in the district court's Memorandum Opinion (pp. 41a to 59a of App. C to the Petition) and the Eleventh Circuit's recitation of the facts construed in the light most favorable to Petitioner (*see*, pp. 4a-19a of App. B to the Petition).

The "Factual Background" recounted in the Petition departs somewhat from Petitioner's previous factual contentions, most importantly by disregarding Petitioner's unequivocal refusal to agree to continue to work for Scott Head, her direct supervisor and the district manager of Respondent's Huntsville office. After Petitioner's November 8, 2001, report of the

alleged events of harassment which occurred in July and August of that year, she continued to work during the investigation by Blue Cross. When Petitioner was advised that the results of the investigation did not corroborate her complaints and that Scott Head would not be fired as she requested, Petitioner insisted that she would not work for Scott Head on at least three occasions and admitted these refusals in her deposition.

After Petitioner insisted that she would not work for Scott Head, Respondent offered the remedial alternative of continuing to work under the supervision of her manager in Huntsville, under the scrutiny of an industrial psychologist[1] that Respondent had successfully used to monitor such situations previously (App. B, pp. 35a-36a). Respondent also offered the remedial alternative of a transfer to a similar sales job in Birmingham, a city where Petitioner had worked in 9 of her 12 years of employment with the Respondent.[2] After Petitioner rejected those

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[1] The Petition inaccurately describes the proposal that an industrial psychologist would monitor the work relationship between Petitioner and Scott Head as "'couples' therapy" (Petition, p. 5). Respondent's Senior Vice President and Compliance Officer "proposed . . . to enlist the assistance of an expert to counsel them and monitor their interactions in order to prevent any future problems. The person he had in mind was an industrial psychologist, . . . whom the company had used successfully in similar cases in the past." (*See*, App. B, p. 18a).

[2] Petitioner's description of Birmingham as a "completely new city" is inaccurate. Petitioner worked for Respondent in Birmingham from her hiring in August 1989 until she became a

(Continued on following page)

alternatives and repeated her refusal to work for Scott Head, Respondent suspended Petitioner. Petitioner never recanted her adamant refusal to continue to work for Scott Head, and after further refusals to accept either alternative, Respondent terminated Petitioner's employment based on this conduct. (*See,* App. C, pp. 53a-58a; App. B, pp. 17a-19a).

The Eleventh Circuit noted and rejected Petitioner's argument that Respondent should have disbelieved that Petitioner in fact refused to work for Scott Head (*see,* App. B, p. 36a). Petitioner states in her deposition that she told Respondent that she was unwilling to continue to work for Mr. Head. (App. C, pp. 68a-70a).

As the district court and the Eleventh Circuit agreed:

> "there is no genuine issue of fact about the reason Baldwin lost her job, and the reason is exactly what the district court said: Baldwin refused to cooperate in the company's reasonable attempt to solve the problem."

(*see,* App. B, pp. 35a-36a; *see also,* App. C, pp. 68a-71a).

Marketing Representative in the Huntsville office in April 1998. (App. C, p. 41a).

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

Petitioner's Complaint, filed September 24, 2003, alleged sex discrimination based on a hostile work environment and retaliation. She also alleged invasion of privacy, intentional infliction of emotional distress, and negligent retention, supervision, and training. On September 13, 2005, the district court granted Respondent's motion for summary judgment on all claims.

The Eleventh Circuit affirmed summary judgment on all claims on March 19, 2007, and is reported at *Baldwin v. Blue Cross/Blue Shield of Alabama,* 480 F.3d 1287 (11th Cir. 2007) and is reprinted as Appendix B to the Petition (App. B). Petitions for rehearing and for rehearing *en banc* were denied on May 30, 2007 (App. A).

REASONS FOR DENYING THE WRIT

The Petition should be denied, because the decision of the Eleventh Circuit correctly applied pertinent decisions of this Court. The "Questions Presented" by the Petition misconstrue the decision below, asserting holdings not made by the Eleventh Circuit Court of Appeals in its opinion to imply a conflict among circuits that does not exist.

Argument on First "Question Presented"

Petitioner's first "Question Presented,"[3] addressed in argument at pp. 7-10 of the Petition under the heading "I. CONTEXT STILL MATTERS," challenges the Eleventh Circuit's discussion of the "equal opportunity curser" principle arguably applicable to vulgar language that was heard by Petitioner as well as by male employees. However, Petitioner's first "Question Presented" is not actually presented by the decision below, because the Eleventh Circuit explicitly declined to answer (App. B, p. 25a):

> . . . whether the sexually harassing conduct that Baldwin did experience during the thirteen months she worked under Head's supervision was "sufficiently severe or pervasive to alter the terms and conditions of [her] employment." [citing *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 582 (11th Cir. 2000)].

The case was decided based on Respondent's proof of the *Ellerth/Faragher* defense, discussed below, and this Petition is not an appropriate vehicle to examine a purported conflict among circuits on an "equal opportunity curser" issue.

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[3] "1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed." (Petition, p. i).

Argument on Second "Question Presented"

Petitioner's second "Question Presented,"[4] addressed in argument at pp. 10-11 of the Petition as "II. TANGIBLE JOB ACTION PRESENT" misconstrues the decision of the Eleventh Circuit, and misstates the actions of Petitioner and Respondent by omitting any reference to Petitioner's repeated refusal to continue to work for Scott Head.

The Petition at p. 10 mentions a "stark choice" of alternatives presented to Petitioner "after reporting harassment," but totally omits reference to the full factual context in which those alternatives were presented.

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[4] Stated as follows:

> 2. Whether the employer satisfies the *Ellerth/Faragher* affirmative defense, i.e., "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commissioned based sales job, or termination if she does not resign." (Petition, p. i).

The Eleventh Circuit carefully and accurately assessed Petitioner's claims that she suffered tangible adverse employment action discrimination by Blue Cross, the first of which was Respondent's offer to transfer her to the Birmingham office in order to resolve the problems she and Head were having, and the second of which was her termination (App. B, pp. 20a-21a).

The Eleventh Circuit held in this case that the *offer* of a transfer is not a tangible job action:

> An offer to transfer an employee, however, is not an adverse employment action. It is merely an offer. Providing an employee with a choice about where she works does not change the terms or conditions of her employment.

(App. B, pp. 20a-21a).

Petitioner argues that "whether a transfer is an adverse employment action is a jury question" citing *Keeton v. Flying J*, 429 F.3d 259 (6th Cir. 2005), *rehearing and rehearing en banc denied* (2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 109, 166 L. Ed. 2d 33 (2006). *Keeton* involved the firing of the plaintiff, rehiring the same day, and an immediate involuntary transfer to a different facility, circumstances materially different from those of Petitioner. There was clearly an involuntary transfer at issue in *Keeton*, not the offer of a voluntary transfer to another supervisor's group as a remedy for alleged harassment by the

current supervisor in response to a stated refusal to work for the alleged harasser.

There is, again, no conflict with the decision of another circuit. Immediate involuntary transfer of an employee may be a tangible adverse job action under the facts in *Keeton*; but offering the alternative of transfer to an employee who has indicated she will not remain in her current work location under her current supervision does not present a tangible job action.

Petitioner argues in this Petition that the offer to monitor the work relationship between her and Scott Head was also a tangible job action. Logic and consistency dictate that this remedial alternative suggested by Respondent – like the transfer – was an offer, not an actual adverse change.

Petitioner's suspension and termination were recognized by the Eleventh Circuit as tangible actions, but not sex discrimination. The court correctly concluded that it was Petitioner, not Respondent, who actually decided and insisted that she would not continue to work for Scott Head which resulted in her termination.

The admitted facts are that at the conclusion of Respondent's investigation, Petitioner was advised that her charges had not been corroborated. The Petitioner insisted that she would not work under the supervision of her manager. Petitioner, not Respondent, rejected the status quo and insisted on a change – the termination of Mr. Head.

After Petitioner repeated that she would not continue to work under the supervision of her manager, she was presented the choice of transferring to another location, or continuing to work under the supervision of her manager in Huntsville, under the scrutiny of an industrial psychologist that Respondent had successfully used to monitor such situations previously. (App. B, pp. 35a-36a).

Summary judgment against Petitioner's claim of retaliatory discharge was affirmed by the Eleventh Circuit, because the discharge resulted from the Petitioner's unequivocal refusal to work under the supervision of the accused manager, and the Petitioner's subsequent rejection of options presented to her of transferring to another location, or continuing to work in the same location under the monitoring of a psychologist. (*See,* App. B, pp. 35a-36a; *see also*, App. C, pp. 68a-71a). Petitioner makes no showing that this finding is at variance with any decision of this Court or in conflict with the precedent set by other United States court of appeals.

Argument on Third "Question Presented"

The Petition's third argument, at pp. 11-15, under the heading "III. THE DECISION BELOW APPLIES TOO STRICT A STANDARD," challenges the Eleventh Circuit's application of the *Ellerth/ Faragher* defense.

Petitioner first argues that the burden of proving an affirmative defense is on the defendant, a point on which Petitioner and the Eleventh Circuit agree (*see*, App. B, p. 4a, "To prevail under the *Faragher-Ellerth* defense, an employer must show not only that it fulfilled its responsibility, but also that the employee failed to fulfill hers." (*See also,* App. B, p. 26a, "Because it is an affirmative defense, the employer bears the burden of establishing both of these elements.")

Petitioner then suggests that application of the *Ellerth/Faragher* defense is based on the "avoidable consequences" doctrine, another point which is not contradicted by the decision of the Eleventh Circuit. However, Petitioner's mistaken inference from that doctrine is that the *Ellerth/Faragher* defense is merely a form of that mitigation of damage defense, permitting apportionment of damages, and, therefore, always a jury question (*see,* Petition, pp. 13-14).

The Eleventh Circuit carefully and correctly analyzed the *Ellerth/Faragher* defense, and concluded that Respondent established both elements of the *Ellerth/Faragher* defense (*see,* App. B, pp. 26a-35a).

Petitioner did not dispute the first element, that Respondent "has a valid anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees, nor does she dispute that there were reasonable reporting requirements and procedures of which she was fully aware." (*see,* App. B, p. 26a).

Regarding the second element of the defense, that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,"[5] the Petition contests the Eleventh Circuit's holding that Petitioner unreasonably delayed her invocation of Respondent's internal procedures, and suggests that there is a material conflict among circuit courts of appeals on the length of time from which unreasonableness can be inferred.[6]

Petitioner in this regard again misconstrues the decision of the Eleventh Circuit. The Eleventh Circuit recognized that circumstances might excuse a delay of the length Petitioner delayed here, or longer. (*See*, App. B, p. 34a). However, rather than setting an arbitrary time limit, the Eleventh Circuit accepted Petitioner's allegations of harassment and rejected her excuses for delay. The allegedly inconsistent decisions of other circuits do not follow a different analytical process, and none have declared an arbitrary minimum time that must be allowed.

The Eleventh Circuit also independently analyzed the Petitioner's flat refusal to cooperate in

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[5] *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270.

[6] The Introduction to the Petition argues that the Eleventh Circuit now has a rule of "mandatory summary judgment" (Petition, p. 1) and that "summary judgment for failure to timely report sexually harassing behavior transforms the second prong of the Ellerth/Faragher affirmative defense to a statute of limitations . . . " (Petition, p. 2).

reasonable remedial measures proposed by Respondent after the investigation of her complaint, and found them an unreasonable failure to take advantage of corrective opportunities (App. B, p. 36a). The Petitioner contends that the remedial options offered after she refused to work with Scott Head were tangible job actions (*see,* Petition, pp. 10-11), but there is no dispute that Petitioner rejected each proposed remedy several times, and that she refused to continue to work for Scott Head. As the Eleventh Circuit noted, "that by itself is enough to carry the day . . . on the second element of the *Faragher-Ellerth* defense." (App. B, p. 32a).

Because the decision of the Eleventh Circuit concerning the *Ellerth/Faragher* defense is soundly based on the undisputed proof of the first element, and the equally undisputed proof that Petitioner failed to cooperate in reasonable corrective measures, Respondent is entitled to summary judgment regardless of whether the Petitioner's internal complaint was considered timely.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 07-275

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Baldwin files this reply to address certain legal arguments made in Blue Cross/Blue Shield of Alabama's Brief in Opposition to the Writ of Certiorari.

LEDBETTER V. THE GOODYEAR TIRE AND RUBBER COMPANY, ___ U.S. ___ , STRESSES IMPORTANCE OF THE STATUTORY 180 DAY REQUIREMENT

Baldwin waited 105 days (July 26, 2001–November 8, 2001) from the first request for sex until she complained to the Blue Cross/Blue Shield's Human Resources department. The Court of Appeals held that Baldwin's failure to report harassment sooner than 105 days establishes the second element of the affirmative defense. (App. B, 32a) Title VII of the Civil Rights Act of 1964 provides, depending on the state, either 180 days or 300 days to challenge an employment practice. 42 U.S.C. § 2000e-5(e)(1). Alabama, without any State or local agency to address such matters, falls into the 180 day category.

In *Ledbetter v. Goodyear Tire and Rubber Company*, __ U.S. __, 127 S. Ct. 2162 (2007), Justice Alito, writing for the Court, emphasized the importance of filing a timely charge of discrimination within 180 days after the alleged unlawful practice to comply with the statutory guidelines. The Court acknowledged that the 180 day deadline is "short by any measure" and "reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 2170-2171.

These Congressionally mandated time periods for making complaints should not by shortened by judicial fiat. Showing Baldwin the exit to the courthouse – at summary judgment – and holding as a matter of law that waiting 105 days from the first instance of sexual harassment entitles Blue Cross/Blue Shield to an affirmative defense is an expansive reading of the *Faragher/Ellerth* defense which is unsupported in the text of Title VII of The Civil Rights Act of 1964, as amended, and the opinions by this Court.

JURY SHOULD DECIDE REASONABLENESS

Blue Cross/Blue Shield endorses the Eleventh Circuit's determination that "reasonable remedial measures" [counseling with the alleged harasser, transfer, or termination] were offered and Baldwin's "unreasonable failure to take advantage of corrective opportunities" was enough to "carry the day" for Blue Cross/Blue Shield at the summary judgment stage. *(See* BIO pg. 12-13)

Understandably, defendants seeking an early ending of sexual harassment cases want Courts to exclusively analyze the plaintiffs' actions in the context of the affirmative defense. However, judgments about reasonableness are considered the province of the jury. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999) ("A reasonableness standard regardless of the modifier, transforms every disciplinary decision into a jury question." (Kennedy, J. dissenting)). *See also U.S. v. Gray*, 367 F.3d 1263, 1269 (11th Cir. 2004) citing *Bryan v. Jones*, 530 F.2d 1210, 1218 (5th Cir. 1976), Wisdom, J., concurring in part and dissenting in part ("**reasonableness is basically a jury question**; it is a concept that loses meaning when courts try to pin it down.") (emphasis added); *Reed v. MBNA Marketing Systems, Inc.*, 333 F. 3d 27, 34 (11th Cir. 2003) (" Summary judgment for

the employer is still possible so long as raw facts are undisputed or assumed in favor of the plaintiff. Even then, however, the judgment call as to reasonableness is itself a jury issue unless no reasonable jury could decide it in the plaintiff's favor. *Mota v. The University of Texas Houston*, 261 F.3d 512, 526 (5th Cir. 2001).").

In the *Mota* case, the Fifth Circuit allowed a delay of nine months prior to reporting harassment. *See Mota v. The University of Texas Houston*, 261 F.3d 512, 526 (specifically finding that the delay of nine months in reporting harassment is not unreasonable in the face of retaliation threats). The 5th Circuit noted that a delay of three months is not unreasonable. *Id.*

As noted by the District Court, Baldwin, who worked for Blue Cross/Blue Shield (not Scott Head) for twelve years, explained why she waited over three months to report on-going harassment:

> I had some very specific career goals. I had a career path that I was trying to travel down and that was to be promoted to the next level of account executive. I didn't want anything, including any comments that were made, any sexual innuendos, any gestures, anything that would appear to not have me fit into the group. I didn't want anything to get into the way of my being promoted.

(App. C, 49a)

After a business dispute, on September 26, 2001, Head informed Baldwin, "Don't you ever fucking go over my head.

You'll fucking lose your job, with his finger pointed in my face as he's screaming at me." (App. C, 48a)[1]

The Court of Appeals rejected Baldwin's explanation and determined that Baldwin waited too long to report harassment, declined to participate in counseling with the alleged harasser, and refused the transfer, thus she was unreasonable as a matter of law. (App. B, 33a)

Baldwin's alleged unreasonable conduct as a matter of law needs to be examined in the context that any investigation did not commence until three weeks after she made her complaints known. (App. C, 53a) After her initial complaint, Baldwin was not interviewed as part of the investigation. *Id.* The determination that there was no merit to her complaint was made, after a discussion on the two hour car ride home, by Rick King. *Id.*

Emma Barclay, one of the HR officials, who participated in the investigation, testified that she did not recall King discussing anything about Head's interview on the way home. (App. C, 53a) Barclay also recalls that at least one of the witness's answers seemed rehearsed. (App. C, 52a)

Baldwin was asked by Rick King, Vice-President and HR compliance manager, to attend counseling with Scott Head,

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[1] According to Head, other male marketing representatives also complained to him about Baldwin's work conduct in that "if the rules worked in her favor, great, if they didn't she would attempt to spin it another way to so she could get **her claws** into it." (App. C, 50a)

her alleged harasser, "to mold and shape his behavior." (App. C, 55a)[2]

Blue Cross also emphasizes Baldwin's "flat refusal" to work with Scott Head. (BIO pg. 12) However, Head also testified that Baldwin had never refused to report to him or show up for work. (App C, 58a)

Blue Cross/Blue Shield's termination letter describes a disagreement among co-workers, not between supervisor and subordinate, and faulted Baldwin for "failing to assume any responsibility for the deterioration of your relationship with Mr. Head." (App. C, 57a)

AFFIRMATIVE DEFENSE PROVIDES GUIDANCE TO JURIES

In *Harris v. Forklift*, 510 U.S. 17, 21-22 (1993), this Court recognized that Title VII "comes into play before a nervous breakdown" and that juries decide whether sexual harassment was objectively severe or pervasive. Justice Scalia, in a concurring opinion expressed that, "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Harris* at 24. Of course, since that time this Court

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[2] Baldwin contends that an issue of fact remains as to whose behavior Blue Cross sought "to mold and shape" as Head did not recall being asked to attend any counseling. (App. C, 58a) Baldwin was also confronted with Hudgins, the District manager informing her that "Scott is the manager. I support him. He will be here for a very long time. You brought charges, [and] they're not [corroborated]. It's over. I can't have strife in the office." (App. C, 56a)

has provided additional guidance in the form of the *Ellerth/Faragher* affirmative defense for juries to determine whether a damage award is appropriate.

In 6th Amendment cases, there has been a renewed recognition of the juries role in the criminal context. *See Rita v. United States*, __U.S. ___, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) (Noting that facts necessary to support a sentence beyond the maximum must be established by a guilty plea or proved to jury beyond a reasonable doubt.). Civil litigants should receive the same opportunities to prove their case with respect to inferences from key facts to a jury rather than have those facts determined at summary judgment, which is improper.

The Court should grant the Writ of *Certiorari* because the Eleventh Circuits's opinion in this case lowers the bar on what is acceptable work place conduct while simultaneously expanding the scope of the affirmative defense.

CONCLUSION

A Writ of *Certiorari* should be issued to review the judgment and opinion of the Eleventh Circuit Court of Appeals and determine whether summary judgment was properly entered on Baldwin's claims. As noted, the time period allowed for reporting harassment is demonstrably shorter than what is allowed in other circuits and even shorter than the limitations contained in Title VII of the Civil Rights Act of 1964.

For the reasons in this Reply brief and those in the original Petition for Writ of *Certiorari*, the Court should grant *certiorari* in this case.

Respectfully Submitted,

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